

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANT AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

160

No. 16,817

United States Court of Appeals
For the
District of Columbia Circuit

FILED

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Joseph W. Stewart
CLERK

SAMUEL BLYTHER,

v.

JAMES T. DYSON, et al.,

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SAMUEL BLYTHER

4909 Illinois Avenue, N. W.
Washington, D. C.

Appellant, pro se

(i)

QUESTIONS PRESENTED

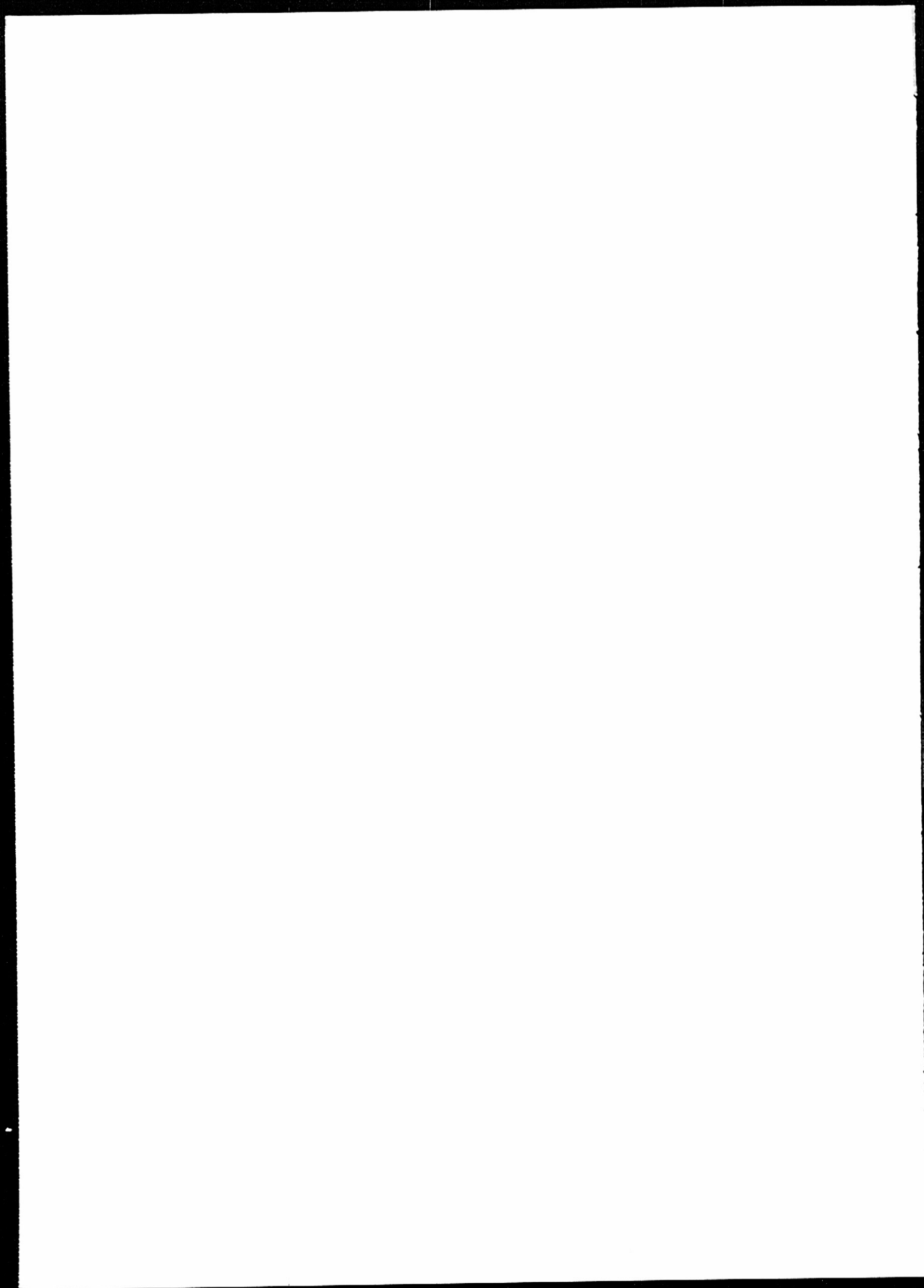
1. Did the court below err in granting appellees' motion for summary judgment and in dismissing appellant's complaint?
2. Do Government supervisory employees have absolute immunity?

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UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 16,817

SAMUEL BLYTHER,

Appellant,

v.

JAMES T. DYSON, et al.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

Samuel Blyther, plaintiff below, appeals from a final order against him in favor of defendants below, entered in the United States District Court for the District of Columbia in Civil Action No. 2459-56, on December 7, 1961, sustaining appellee's motion for summary judgment and dismissing the complaint.

The District Court had jurisdiction under D.C. Code 1961, Sec. 11-306. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. Sec. 1291.

STATEMENT OF THE CASE

This is an appeal taken by appellant to reverse a judgment of the District Court entered on the 7th day of December, 1961, granting appellees' motion for summary judgment and dismissing appellant's complaint.

The complaint consists of two counts. The first count charges libel against the defendants (see JA, Count One), while the second count thereof alleges conspiracy and resulting damages (see JA, Count Two).

The appellant was and is employed as an offset press operator for the Publications Division, Defense Printing Service, Department of the Navy. That on June 18, 1955, the appellees jointly and severally wrote and published of and concerning the appellant the following libel: "that on June 18, 1955, Mr. Blyther refused to complete work assigned by his immediate supervisor. In lieu of performing this work as directed he departed from his duty station without receiving official permission."

The foregoing charges were not only false and malicious but were initiated by the appellees for the sole purpose of discrediting the appellant and to force his separation from his Grade 14 employment.

A hearing was held on the foregoing charges on November 14, 1955, in the Administrative Office, Navy Department, and on February 2, 1956, appellant was exonerated of said charges and the charges of refusal to accept work assignment and warning letter were removed from appellant's file.

The decision of the court below makes the doctrine of unqualified privilege applicable to the facts in the instant case. Appellant challenges this holding and therefore prosecutes this appeal.

STATEMENT OF POINTS ON APPEAL

1. The court below erred in granting appellees' motion for summary judgment and in dismissing appellant's complaint.
2. Government supervisory employees do not have absolute immunity.

SUMMARY OF ARGUMENT

The allegations of the complaint, coupled with the supporting affidavit of appellant, raise material factual issues for trial determination.

The doctrine of "absolute immunity" enunciated in the case of Barr v. Matteo, 360 U.S. 564, by the Supreme Court, does not apply to supervisory government employees who falsely report for personal reasons.

Trial determination is required to ascertain whether "absolute immunity" exists.

This is especially true where a question of fact exists as to whether the defamatory statements were issued in the regular course of official duty.

ARGUMENT

- I. Do government supervisory employees have absolute immunity when they use their powers to vent their spleen upon others, in making internal reports respecting subordinates?

Nothing is more precious to a man or woman than his or her good names - "it is the immediate jewel of their souls" - the right to it is protected by natural as well as case laws. Anything to the contrary is a court created exception to the rule, save only the constitutional immunity given members of Congress for words spoken in debate in chambers.

Appellant contends that "printing foremen" such as here characterized the capacities of the appellees, are not included within the sphere of the decision in Barr v. Matteo, supra. These appellees were merely subordinate employees. They had no policy making power.

These appellees contend and urge these contentions upon the court — that, "Government Supervisory Employees have absolute immunity, when according to their duty, they make Internal Reports respecting their responsibilities." This argument implies that these appellees could not have performed their supervisory duties fearlessly and in a manner

calculated to protect the public interest unless they could write whatever they chose to say in such report — impelled by whatever motive, malicious or otherwise — about anybody who might have subordinate official contact with their function. Appellees ask like immunity for like officials. To state the proposition in terms of actual case before the court, should be to demonstrate its absurdity and enormity.

The courts have created some exceptions to the general rule that a man has a right to have his reputation respected by all and protected by the courts. They are said to have been grounded upon consideration of public policy — a curtailment of the rights of individuals for the greater good of all.

Thus, in the case of official reports of subordinates to their superiors, when it is the duty of the subordinates to report about matters over which both exercise jurisdiction, and the reports are free of malice and spleen, the courts have sustained the immunity.

However, where malice or spleen is shown, the immunity ceases. See Dickins v. International Brotherhood, Etc., 84 U.S. App. D.C. 51, 171 F.2d 21 and National, Etc. v. Haan, 55 App. D.C. 243, 4 F.2d 436, 441.

II. Reports Not Ordered By Superiors

There is nothing in the record as it appears before the court that appellees' superiors ordered and requested a report from the appellees. It may be noted at Page 582 of the Barr case, supra, in the dissenting opinion of Chief Justice Warren, that the Chief Justice stated the following:

"It may be assumed - arguendo - that a Government Employee should have absolute immunity when according to his duty he makes internal reports to his superior or to another upon his superior's order."

Here the appellees make "False Reports" not on the orders of the superiors but on their own initiatives, and in order to vent a spleen of personal vengeance.

III. The Barr Case, supra, established no new law

It must be conceded that, before the Barr decision, the Supreme Court had held in the Spaulding v. Vila case, 161 U.S. 483, that the controlling factor was the duties with which the particular officer, sought to be made to respond in damages, is entrusted, the relation of the Act complained of "to matters committed by law to his control or supervision."

The decisions have indeed always imposed as a limitation upon the immunity that the official's act must have been within the scope of his powers, since they exist only for the public good, never cover occasions where the public good is not their aim, and hence that to exercise a power dishonestly is necessarily to overstep its bounds.

The holding in the Barr case, supra, is consistent with the holding in the Spaulding case, supra. Those decisions were and should remain limited to policy making employees of the Federal Government.

It seems to appellant that the courts should go no further than they have already gone. See Murray v. Brancato, 290 N.Y. 52, 48 N.E.2d 257, and see the concurring opinion of Chief Judge Groner in Glass v. Ickes, 73 App. D.C. 3, 117 F.2d 273, certiorari denied 311 U.S. 718.

It seems absurd to say the employees of the Federal Government below the policy making level will be hampered seriously in the performance of their duties, unless they are free to libel their subordinates maliciously without having to answer for their motives. No such public interest requires that such an overseer be so protected. It is a dangerous thesis and altogether subversive of the fundamental principle — that no man in this country is so high that he is above the law.

The basic issue in the instant case is not the same as that in the Barr case, supra. Here we are dealing with non-policy making employees and their subordinate. Their actions were not directed from above but initiated by themselves, and inspired by selfish motives.

CONCLUSION

In the light of the foregoing, appellant urges the court to reverse the judgment below and remand the cause for trial.

Respectfully submitted,

SAMUEL BLYTHER

4909 Illinois Avenue, N. W.
Washington, D. C.

Appellant, pro se

(i)

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JOINT APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Samuel Blyther
4909 Illinois Ave., N. W.
Washington, D. C.

Plaintiff

vs.

James T. Dyson
210-14th Place, N. E.
Washington, D. C.

and

Henson C. Thompson
Defense Printing Service
Navy Department
Washington, D. C.

Defendants)

Civil Action No. 2459-'56

CIVIL DOCKET

DATE

PROCEEDINGS

1956

June 13	Complaint, appearance, Jury demand.	filed.
June 13	Summons, copies (2) and copies (2) of Complaint issued #1 Served 6-15-56 #2 N.F. 7-5-56	
July 3	Answer of deft. James T. Dyson to complt. App of Oliver Gasch, Edward P. Traxell, Frank H. Strickler, Robert L. Toomey for deft. Dyson; c/m 7-2-56; exhibit; affidavit. filed.	
Dec. 5	First notice under Rule 13.	

1957

Jan. 8	Cause dismissed, as of 1/5/57 (N) (By Clerk)	
Feb. 5	Motion of pltf. to reinstate; affidavit.	filed.
Feb. 5	Order reinstating cause. (N)	McGuire, J.
July 5	First notice under Rule 13.	

July 18 Summons, copy & copy of complt. issued vs. deft. #2.
N.F. 8-8-57

Aug. 16 Summons, copy & copy of complt. issued vs deft. H.C.
Thompson. ser.2-4-58. (Vs.)

Sep. 9 (Summons 8-16-57) N.F. 9-6-57.

1958

Jan. 29 Summons, copy & copy of complt. issued.

Feb. 18 Motion of deft. Henson C. Thompson to quash service of
process; c/m 2-18-58. P&A; M.C. 2-18-58; Appearance
of Oliver Gasch, Edward P. Troxell, & E. Riley Casey as
attys. for deft. #2. filed.

Mar. 5 Order granting motion of deft., Henson C. Thompson to quash
service. Letts, J. (N)

Apr. 23 Summons, copy & copy of complt. issued. #2 Ser 4-24-58.

May 12 Answer of deft. #2 to complt; c/m 5-12-58; App. Oliver
Gasch, Ed. P. Troxell, and E. Riley Casey for deft. #2. filed.

May 12 Calendared (N)

Oct. 24 Consent order removing cause from trial calendar pending
disposition of cases of Supreme Court (N/AC) (N) McGuire, J.

1960

Jun. 24 Appearance of George B. Parks and Robert A. Harris as attys
for pltf (AC/N) filed.

Jul. 1 Motion of U. S. in behalf of defts to restore to trial calendar;
c/m 7-1-60; P & A; M.C. 7-1-60 filed.

Jul. 26 Order restoring cause to the trial calendar (N) Hart, J.
micro 7-29-60

1961

May 17 Called Pretrial Examiner.

May 17 Appearance of plfff. in proper person; N/AC. filed.

Sept. 11 Motion of defts for summary judgment on Count I and for dis-
missal of Count II of complt; statement of material facts;
P & A; c/m 9-11-61; Exhibits 1 thru 4 & Exhibits A thru Q;
M.C. 9-11-61. filed.

Sept. 28	Extension of time to file opposition to deft.'s motion for summary judgment to & including 10-16-61. filed.
Oct. 16	Memorandum of P & A of pltf. in opposition to motion for summary judgment; c/m 10-16-61; affidavit. filed.
Nov. 7	Order granting motion of defts for summary judgment on count one of complaint; granting motion of defts to dismiss count two of complaint. (N) McGarraghy, J.
Dec. 4	Notice of appeal of pltf; deposit by Blyther, \$5.00 (Copy mailed to David C. Acheson) filed.

[Filed June 13, 1956]

COMPLAINT FOR LIBEL, CONSPIRACY AND DAMAGES

1. The jurisdiction of the court is evoked by virtue of the amount in controversy being in excess of \$3,000.00 exclusive of costs.

COUNT ONE

2. Plaintiff sues the defendants, James T. Dyson and Henson C. Thompson, for that heretofore, to-wit; on the 18th day of June, 1955, and at all time prior thereto and thereafter, the plaintiff has been a patriotic, and honorable citizen, and until the grivances hereinafter mentioned, has always been considered a trained, efficient, conscientious and productive worker, and whereas the plaintiff has been since the 2nd day of February, 1943, an offset press operator, in the Department of Navy in the United States Government, and having attained a Grade 14 in his classification, and whereas in the performance of his duty, as aforesaid, a certain press is assigned to plaintiff for operation. That during all of the time enumerated above and especially on the 18th day of June, 1955, the defendant, Dyson, was the plaintiff immediate supervisor and the defendant, Thompson, was foreman of the press section, both of whom, were connected with plaintiff's assignments in the operation of the said offset press.

3. That on or about June 18th, 1955, the said defendants, severally and jointly wrote and published of and concerning the plaintiff the following charges:

"That on June 18th, 1955, Mr. Blyther refused to complete work assigned by his immediate supervisor. In lieu of performing this work as directed, he departed from his duty station without receiving official permission."

That the said writing was delivered by said defendants, Dyson and Thompson, to the Head of the Reproduction Branch of the Navy Department and to the Director of the Publication Division of the Navy Department, and was exposed to and read by many other persons outside of the Federal Government.

4. That all of the provisions of the said written charges set forth in paragraph 3 above are false, defamatory and untrue, and were known by the said defendants, to be false and untrue and were wilfully and maliciously written and published of and concerning the plaintiff for the purpose of injuring the plaintiff in his trade, work, employment, reputation and efficiency in the eyes of his employer, the United States of America.

5. That by means of the said false and defamatory writing and publication the plaintiff's employment, efficiency, good name, reputation were injured both in his employment and in the community.

6. That as a result of the aforesaid grievances plaintiff was damaged to the extent of \$50,000.00.

Wherefore, plaintiff demands judgment against the defendants and each of them, in the sum of \$50,000.00.

COUNT-TWO

Plaintiff further sues the said defendants and for cause of action alleges:

7. That he adopts by reference all of the pertinent allegations appearing in Count One herein.

That on the 18th day of June, 1955, and for a long time prior thereto and thereafter the defendant, James T. Dyson and the defendant, Henson C. Thompson, knowingly, wilfully and maliciously conspired, confederated and contrived, (1) to injure, retard, confuse and separate plaintiff from his said employment with the Federal Government, and (2) to cause unrest and disorganization in the plaintiff's work and work

assignments, so as to incite repulsion and defiance of work assignment in the regular course of plaintiff's employment.

8. That in consequence and pursuance of said conspiring confederating and contriving by and between the said defendants as aforesaid, the said defendants denied to the plaintiff his normal and well earned promotions in his trade and employment as an offset press operator, that said defendants employed various and sundry devices, methods and means to effectuate the denial of plaintiff's normal and earned promotion as aforesaid.

In consequence and pursuance of the said conspiracy, confederacy and contrivance, by and between said defendants, the defendants knowingly and wilfully filed against the plaintiff false and fabricated charges, and did on or after the 18th day of May 1955 wrongfully and illegally accuse the plaintiff of refusing to perform work directed by his supervisor and departing from his duty station without receiving official permission. That as a result of which said false and baseless charges the plaintiff's record was clouded with a "warning for failure to accept a work assignment" notice dated July 27th, 1955, from the office of the Director of Publication of the Navy Department.

9. That as a result of the foregoing the plaintiff was forced to lay out and expend large sums of money to remove the said warning notice from his record and conducting a hearing which resulted in the withdrawal of the said false and malicious charges by the said defendants. That the plaintiff further alleges that as a result of the said conspiracy and the acts in furtherance thereof by the defendants, as aforesaid, he has suffered loss of earnings, loss of increased earning power, incurred expenses to clear his name and record, physical pain and mental anguish, all to plaintiff's damages in the sum of \$50,000.00.

Wherefore, plaintiff demands judgment against the defendants, and each of them, in the sum of \$50,000.00, besides costs.

/s/ Samuel Blyther
Plaintiff

/s/ Everett L. Edmond
1510-9th St., N.W.
Ad. 2-5128
Attorney for plaintiff

JURY DEMAND

The plaintiff demands a jury of the issues in the above entitled cause.

/s/ Everett L. Edmond

[Filed July 3, 1956]

ANSWER OF DEFENDANT, JAMES T. DYSONFirst Defense

The complaint fails to state a claim upon which relief can be granted.

Second Defense

Answering specifically the numbered paragraphs of the complaint, defendant, Dyson, avers:

1. Paragraph 1 of the complaint states a conclusion of law which requires no answer. In any event it is denied that the amount in controversy exceeds \$3,000.

2, 3, 4, 5, 6, 7, 8 and 9. Denied.

Third Defense

The alleged acts complained of by plaintiff, if performed by this defendant, were performed by him as a part of and under color of his official duties as an employee of the government of the United States and he is immune from liability therefor.

Fourth Defense

The alleged acts complained of by plaintiff, if performed by this defendant, were performed on a qualifiedly privileged occasion and were performed without malice, and this defendant is not liable therefor.

/s/ Oliver Gasch
United States Attorney

/s/ Frank H. Strickler
Assistant United States Attorney

/s/ Edward P. Troxell
Principal Assistant
United States Attorney

[Certificate of Service]

/s/ Robert L. Toomey
Assistant United States Attorney

[Filed May 12, 1958]

ANSWER OF DEFENDANT, HENSON C. THOMPSON

First Defense

The complaint fails to state a claim upon which relief may be granted.

Second Defense

Answering specifically the numbered paragraphs of the complaint defendant Thompson avers:

1. Paragraph No. 1 of the complaint states a conclusion of law which requires no answer.

2, 3, 4, 5, 6, 7, 8 and 9. Denied.

Third Defense

The alleged acts complained of by plaintiff, if performed by this defendant, were performed by him as a part of and under color of his official duties as an employee of the Government of the United States, and he is immune from liability therefor.

Fourth Defense

The alleged acts complained of by plaintiff, if performed by this defendant, were performed on a qualifiedly privileged occasion and were performed without malice and this defendant is not liable therefor.

Fifth Defense

This action is barred by the statute of limitations.

WHEREFORE, defendant having fully answered the allegations contained in the complaint demands judgment together with the costs of this suit.

/s/ Oliver Gasch
United States Attorney

/s/ Edward P. Troxell
Principal
Assistant United States Attorney

/s/ E. Riley Casey
Assistant United States Attorney

[Certificate of Service]

[Filed 9/11/61]

MOTION FOR SUMMARY JUDGMENT WITH RESPECT TO COUNT ONE
AND FOR DISMISSAL OF COUNT TWO OF THE COMPLAINT

The defendants herein, through their attorney, the United States Attorney for the District of Columbia, respectfully move this Court to grant summary judgment for them with respect to count one of the complaint for the reason that the pleadings, affidavits of Walter A. Leeds, Henson C. Thompson and James T. Dyson, the certified regulations and the certified record of the Department of the Navy attached hereto and made a part hereof, show there is no genuine issue as to any material fact and they are entitled to judgment as a matter of law for the reasons set forth in the attached memorandum of points and authorities.

These defendants also move the Court to enter an order of dismissal as to count two of the complaint for the reason that this count fails to state a claim against them upon which relief may be granted.

/s/ David C. Acheson
United States Attorney

/s/ Edward P. Troxell, Principal
Assistant United States Attorney

/s/ Joseph M. Hannon
Assistant United States Attorney

[Certificate of Service]

[Filed 9/11/61]

STATEMENT OF MATERIAL FACTS
AS TO WHICH THERE IS NO GENUINE ISSUE

1. This is an action in which plaintiff seeks damages for an alleged libelous statement said to have been written and published by the defendants, severally and jointly, during the course of their employment as Federal employees which related to the plaintiff, a fellow subordinate employee to these defendants.

2. The plaintiff, Samuel Blyther, was employed as an offset press operator for the Publications Division, Defense Printing Service, Department of the Navy, on or about June 18, 1955, the date of the alleged libelous statement.

3. The defendants, James T. Dyson and Henson C. Thompson, were employed by the same division of the Department of the Navy and on the date of the alleged libel were plaintiff's immediate supervisor and foreman respectively. (Affidavit of Walter A. Leeds.)

4. On June 18, 1955 the defendant James T. Dyson, plaintiff's immediate supervisor, assigned plaintiff certain work which he was to complete with his press. The task involved the use of certain plates which were difficult to install on the press and to operate. (Pages 2 and 3 of Exhibit A.)

5. When defendant Dyson assigned the work, a controversy arose between plaintiff and Dyson over the work plaintiff was to do. After the controversy ended, plaintiff departed his place of employment for home before his work day had terminated. (Pages 18 and 19, Exhibit A.)

6. On June 20, 1955 defendant Dyson, acting in his capacity as plaintiff's supervisor, prepared a report respecting the incident which he turned over to the codefendant, Henson C. Thompson, who was foreman to both the plaintiff and the defendant Dyson. (Exhibit Q and affidavit of James T. Dyson.) This report recited:

"On Saturday, 18 June 1955, about 12:30 p.m. I gave Samuel Blyther a job to work on. The job was twenty-eight plates at 850 copies each plus overages. It was not anything hard about the job. The job was regular line work. He ran one plate on the job. I went passed his press and he asked me if I had another job to give him. I asked him what was wrong with the job he had. He said the plates was hard to get on the press. I tried to explain to him about some of the plates we had been getting lately. I also told him other operators had been complaining about the plates. He told me if he didn't get another job, he

was going to clean up and go home. I walked away because I thought he was only joking about cleaning up and going home. He put another plate on his press and ran it. I looked over by his press a little later and he was preparing to clean up. I went over to him and tried to persuade him not to clean up. I told him he was only making it hard for himself. He told me when he says something he means it and continued to clean up. I went up front and reported what had happened to Mr. Henson Thompson."

7. On the same day, to wit June 20, 1955, defendant Henson C. Thompson, in his capacity as foreman, directed a report to the Plant Superintendent of the Defense Printing Service respecting the same incident. (Exhibit P and affidavit of Henson C. Thompson.) In this report the defendant Thompson stated in part:

"... The Supervisor of the Group, James Dyson, reported to me about 1405 that he had given a job to Samuel Blyther, and that Blyther had refused to work on the job assigned him, stating that if he could not give him another job, he would clean up his press and go home."

8. Thereafter, by letter dated 22 June 1955, Mr. Walter A. Leeds, the Plant Superintendent requested of the Director of the Administrative Office of the Publications Division that plaintiff be disciplined for the aforementioned incident. (Exhibit O.)

9. Subsequently, by memorandum dated July 27, 1955, plaintiff received a "warning for failure to accept a work assignment" from A. N. Spence, Director of the Publications Division. (Exhibit L.) Paragraph 3 of the "warning" stated:

"You are advised that refusal to perform work as directed by your supervisors cannot be tolerated, and future such instances on your part will reflect unfavorably on your suitability for employment."

10. Plaintiff appealed the "warning action" (Exhibit J) and on November 14, 1955 the matter came on for a hearing. (Exhibit A.)

11. The results of plaintiff's appeal were released on February 2, 1956 (Exhibit E) and recited in part as follows:

"2. After a complete review of all information presented at the hearing, and of a statement from Mr. Henson Thompson, the following conclusions have been reached:

"(a) There is an area of doubt as to whether you and your supervisor had a mutual understanding of your reasons for requesting that you be assigned other duties.

"(b) It appears that a misunderstanding existed as to whether you were being excused from work or were leaving without authority.

"In view of these facts, it has been decided to withdraw the charges of refusal to accept a work assignment and to remove the warning letter from your personnel record."

12. Thereafter, the warning letter was removed from plaintiff's personnel record.

13. It was the responsibility of the defendant Dyson, as plaintiff's first line supervisor, as well as the defendant Thompson, as plaintiff's foreman, to furnish the management officials of the Publications Division, Department of the Navy, a written report bearing upon the circumstances of plaintiff's alleged infraction of the rules. (Exhibit D, paragraph 2-3 of section 2 of Navy Civilian Personnel Instructions, marked Exhibit 1; and affidavit of Walter A. Leeds.)

14. Plaintiff alleges in count one of his complaint that defendants Dyson and Thompson, severally and jointly, on or about June 18, 1955 published a libelous statement respecting him, to wit:

"That on June 18, 1955, Mr. Blyther refused to complete work assigned by his immediate supervisor. In lieu of performing this work as directed, he departed from his duty station without receiving official permission."

This is the same statement referred to in either paragraph 6 or 7 hereof because as plaintiff alleges in paragraph 3 of the complaint:

"... the said writing was delivered by said defendants, Dyson and Thompson, to the Head of the Reproduction Branch of the Navy Department and to the Director of the Publication Division of the Navy Department . . . "

15. In count two of his complaint, plaintiff charges the defendants with conspiracy to injure, retard, confuse and separate plaintiff from his said employment with the Federal Government and to cause unrest and disorganization in that defendants did wilfully file false charges against him to the effect that he refused to perform a certain work assignment.

/s/ David C. Acheson
United States Attorney

/s/ Edward P. Troxell
Principal
Assistant United States Attorney

/s/ Joseph M. Hannon
Assistant United States Attorney

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT WITH RESPECT TO COUNT ONE
AND FOR DISMISSAL OF COUNT TWO OF THE COMPLAINT**

Issue

Defendants contend on the basis of the aforesaid undisputed facts that they are entitled to judgment on count one as a matter of law. Both defendants, who were serving as employees of the Federal Government in a supervisory capacity to that of the plaintiff, who was also an employee of the United States, assert that they were absolutely privileged to prepare written reports bearing upon the suitability and general fitness of an employee within their charge.

Defendants also contend that count two of the complaint fails to state a claim against them upon which relief can be granted and for this reason count two should be dismissed.

Argument

I - Government supervisory employees have absolute immunity when, according to their duty, they make internal reports respecting their responsibilities.

The courts in the District of Columbia have long held that a Federal employee has absolute protection and immunity for what he may write to a superior in the course of his official duties. In De Arnaud v. Ainsworth, 24 App. D.C. 167 (1904) defendant, chief of the Record and Pension Office of the War Department, was sued in libel by plaintiff for a report defendant made to the Secretary of War in connection with plaintiff's application for a medal of honor. The Court of Appeals held that the fact that plaintiff brought the action against defendant in his private individual character, and without reference to his official duties or position made no difference so far as his right of defense was concerned; that the report was made in the course of the official duty of the person required to make it and that it was absolutely privileged. The court said:

"Public policy affords absolute protection and immunity for what may be said or written by an officer in his official report or communication to a superior, when such report or communication is made in the course and discharge of official duty. Otherwise the perfect freedom which ought to exist in discharge of public duty might be seriously restrained, and often to the detriment of the public service." (p. 178)

In Farr v. Valentine, 38 App. D.C. 413 (1912) a former general superintendent of logging in the Indian Service sued the head of the Indian Service in libel because the latter made recommendations to the Secretary of Interior regarding the unfitness of plaintiff for the position occupied by him. The court held that the letter was obviously written by defendant in the line of his duty, and the occasion was therefore privileged, saying in part:

"Everything in this letter is relevant to the point upon which it centered - the unfitness of the plaintiff for the position occupied by him. Had the Secretary himself written this letter to the plaintiff and spread it upon the files of the Department as a justification for his action in dismissing the plaintiff, clearly personal motives could not have been imputed to such official conduct. And yet there is no more reason for imputing personal motives to the conduct of the head of the bureau, who, in the line of his duty, makes such a recommendation to his superior, the head of the Department, than in imputing such motives to the superior himself. To so hold would, in effect, largely interfere with the proper and effective administration of the business of the Department. Its head can intelligently act only through subordinates." (p. 420)

The above two cases were cited in the majority opinion of the Supreme Court in Barr v. Matteo, 360 U.S. 564 (footnote 9, p. 572). There a plea by a federal official of absolute privilege was upheld as a defense to a suit charging that a press release issued by him was defamatory of plaintiffs, former federal employees. Although the dissenting opinion of the Chief Justice does not agree with the majority opinion insofar as applying absolute privilege to the facts of that case, it recognizes an absolute privilege for internal reports made to a superior, saying:

"It may be assumed, arguendo, that a government employee should have absolute immunity when according to his duty, he makes internal reports to his superior or to another upon his superior's order. Taylor v. Glatfelter, 201 F.2d 51; Farr v. Valentine, 38 App. D.C. 413; De Arnaud v. Ainsworth, 24 App. D.C. 167. This might be a practical necessity of government that would find its justification in the need for a free flow of information within every executive department. It may not be unreasonable to assume that if a maliciously false libel is uttered in an internal report, it will be recognized as such and discredited without further dissemination." (p. 582)

Since it is clear that the memoranda prepared by both defendants relating to the incident of their subordinate's refusal to work were made internally and in response to a duty demand that they make such reports, it follows that defendants are absolutely privileged and entitled to judgment as a matter of law.

II - Count two of the complaint which charges conspiracy should be dismissed for failure to state a claim upon which relief can be granted.

Count two of the complaint charges that these defendants conspired and confederated together to do a number of things with respect to plaintiff such as decreasing his earning capacity, denying him his promotions and to fabricate the charge of his failure to perform work assigned to him.

Authorities are numerous with respect to the proposition that a conspiracy creates no civil liability unless it causes injury and that it is only the wrongful acts done by the defendants to the plaintiff that are actionable. United States v. Pan American Petroleum Co., 55 F.2d 753, 778, cert. den. 287 U.S. 612; Ewald v. Lane, 70 U.S.App.D.C. 89, 104 F.2d 222; and DeBogbula v. Goss, 90 U.S.App.D.C. 28, 193 F.2d 35. Moreover, it is equally clear that an alleged conspiracy among Government employees relating to matters within their responsibilities is nonactionable so long as the employees are acting within the scope of their official duties. Cooper v. O'Connor, 69 U.S.App.D.C. 100, 99 F.2d 135. Since it is manifest from a reading of the complaint as a whole, and count two in particular, that the defendants were acting within the scope of their duties, count two should be dismissed for failure to state a claim upon which relief can be granted.

Wherefore, the premises considered, the Court is urged to grant summary judgment to these defendants on count one of the complaint and to dismiss count two for failure to state a claim upon which relief can be granted.

/s/ Edward P. Troxell
Principal
Assistant United States Attorney

/s/ David C. Acheson
United States Attorney

/s/ Joseph M. Hannon
Assistant United States Attorney

GOVT'S EXHIBIT NO. 1

NAVY CIVILIAN PERSONNEL INSTRUCTIONS
OIR, AstSecNavAir

NCPI 45.2-2
23 September 1954

INSTRUCTION 45

DISCIPLINARY ACTIONS, REMOVALS, AND PROHIBITIONS

Section 1. References

2. General provisions
3. Standard Schedule of Disciplinary Offenses and Penalties
4. Responsibility for administration of discipline
5. Procedure
6. Corrective Action under Public Law 623
7. Section 14 Rights, Veterans' Preference Act
8. Removal or separation at the request of the Civil Service Commission
- ~~*9. - Arrest records from the Commission [C.S.545]~~
10. Conduct of employees; general problems which may require disciplinary action; and miscellaneous prohibitions*
11. Enclosures

SECTION 1, REFERENCES

Paragraph No.

References. 1-1

1-1. The following are references in connection with disciplinary actions, removals, and prohibitions:

a. The Act of 24 Aug 1912, as amended by Public Law 623, 80th Congress (62 Stat. 354; 5 USC 652).

b. Federal Personnel Manual, Chapter S1 and Parts 9 and 22 of Chapter Z1.

c. Section 14, Veterans' Preference Act of 1944 (Public Law 359, 78th Congress), as amended by Public Law 325, 80th Congress (58 Stat. 390; 61 Stat. 723; 5 USC 863).

d. Section 161, as amended, Revised Statutes (5 USC 22).

e. Executive Order 8390 of 11 Apr 1940, entitled "Executive Order 8390, Amending the Executive Order of January 17, 1873, to Permit Employees of the Federal Government to Hold Certain Positions in the Schools and Universities of Any State, Territory, or Municipality."

f. SecNav Instruction 11101.5 of 11 Aug. 1953, "Work Performed by Civilian Federal Employees in the Maintenance of Public Quarters."

SECTION 2, GENERAL PROVISIONS

	Paragraph No.
Scope.	2-1
Legal basis.	2-2
General principles	2-3
Irresponsible charges by employees	2-4
Veterans entitled to the benefits of Section 14, Veterans' Preference Act	2-5

2-1. SCOPE.--The provisions of this Instruction apply to all American citizen civilian employees of the Navy and Marine Corps departmental and field services* except civilian Marine personnel of the Military Sea Transportation Service. CMPI 45 governs civilian Marine personnel and makes cross reference to this Instruction for applicable portions.* The principles prescribed herein shall be adapted for use in administering alien and native employees, consistent with local laws, regulation and customs.

2-2. LEGAL BASIS.

a. Statutory provisions.--Section 6 of the Act of 24 August 1912, as amended by Public Law 623, 80th Congress, constitutes the basic law governing removal, demotion and suspension of civilian employees.

b. Civil Service Regulations.--The Civil Service Regulations as set forth in Chapter Z-1 of the Federal Personnel Manual, particularly Regulations 9 and 22, provide the minimum procedural requirements and the authority for effecting removals, demotions and suspensions.

The Department, in developing this Instruction, has not only complied with requirements of Regulations 9 and 22 but has supplemented them with procedures designed to achieve effective administration.

2-3. GENERAL PRINCIPLES.--*Most disciplinary actions are occasioned by the employee's failure to comply with a rule or custom governing social conduct, work procedure, safety practice, etc. The offenses listed in the standard schedule (see NCPI 45.11-Encl. 1) include many situations of this nature. Other offenses based on violation of Civil Service Regulations or statutes are listed in the Table of Miscellaneous Offenses and Penalties (see NCPI 45.11-Encl. 5). Even though a specific regulation or custom concerning employment has not been violated, information may be brought to the attention of management which reflects adversely upon the suitability and general fitness of an employee. Such information may come to management from a variety of sources such as reports of arrest records and reports from investigation of an employee's previous employment and background. On the basis of such information disciplinary action looking to removal may be initiated if warranted. The general charge of conduct unbecoming to a government employee may be used if appropriate. Otherwise the specific reasons which indicate the employee is undesirable should be used as the reasons for initiating action. Any of the above bases may be considered sufficient to initiate disciplinary action. When such action is initiated the following principles shall be observed:*

a. Purpose.-- Disciplinary action shall be taken solely for the purpose of correcting offending employees and maintaining discipline and morale among other employees. Where this aim can be accomplished through orally admonishing the offenders, formal disciplinary action should not be taken.

b. Timing of the action.-- Necessary disciplinary action should be initiated promptly after management learns of the offense.

c. Determining the facts.

(1) The primary function of disciplinary procedure prior to decision is to determine the facts, not to provide a means for prosecuting the employee.

(2) Employees will be considered innocent until contrary evidence is produced.

(3) A prima facie case against the employee must exist before disciplinary action is initiated. A prima facie case is one established by sufficient evidence to justify a presumption of guilt.

(4) The employee must be confronted with all the evidence that influences management's consideration of the case and must be permitted to defend himself against such evidence prior to decision regarding the action to be taken.* When disciplinary action (including removal, suspension or demotion) is contemplated by management on the basis of classified information, the facts warranting such action must be developed in unclassified form, by separate investigation if necessary, so that the employee can be confronted with the reasons for the adverse disciplinary action.*

(5) It is management's responsibility to ascertain all pertinent facts prior to making a final decision and to uncover and attach due weight to factors supporting the employee's position whether or not the employee offers such factors in his own defense.

d. Determining the penalty.

(1) The penalty imposed or assigned shall be the minimum which may reasonably be expected to correct the employee and maintain general discipline and morale.

(2) The employee's work history, character, and potential should be considered in determining the severity of the penalty.

(3) The cost of removing the employee and recruiting and training another person should be weighed in terms of the cost of intensive re-orientation of the employee before removal action is taken.

(4) The denial of charges which are later established will not be the basis for increasing the penalty nor for additional charges.

(5) Past delinquency or misconduct may be used in determining the penalty provided the employee is notified in advance that the contemplated penalty is based partly on his past record and provided he

Govt. Exhibit No. 1 (cont'd)

is given opportunity to comment upon, or explain such record.* In such instances, it is not intended that a rehearing be held on the specific issues for which appellant was previously disciplined, but rather that he be advised that those offenses will be considered in determining the appropriate penalty for the current offense, and be given opportunity, through noting the dates, times and circumstances of the offenses, to comment upon the past delinquency or past record.

(6) The assignment of concurrent penalties is prohibited.*

e. Imposing the penalty.-- At the time the penalty is imposed, the employee should be fully advised of the facts which support the action. He should be advised why, in view of the facts, disciplinary action in his case is necessary (i.e., to impress him with the importance of observing the rules of correct employee conduct and/or to maintain general discipline and morale). Where action other than removal is taken, he should be assured that everything possible will be done to assure his future success on the job.

f. Responsibility of supervisors.

(1) The immediate supervisor is responsible for maintaining discipline and morale among the employees he supervises and for initiating appropriate disciplinary action where the facts warrant such action.

(2) Supervisors must thoroughly understand the purposes of disciplinary action and must be trained for such responsibilities.

2-4. IRRESPONSIBLE CHARGES BY EMPLOYEES.--If in the course of disciplinary proceedings an employee makes false or unfounded charges or statements which slander or defame other employees, supervisors or officials or which reflect unfavorably on their honesty, integrity, motives, or efficiency, the proceedings will be stopped while the hearing official or board considers the matter. In view of the impropriety of taking any action which might be construed as unreasonably hampering the employee in presenting his case, determination will be made as to whether or not the objectionable statements are false or unfounded which slander or defame, and in a real sense attack the honesty, integrity,

motives or efficiency of others. A distinction must be made between the employee's statements made to explain his actions or conduct and statements made for the purpose of discrediting and attacking other persons. If necessary, the hearing official or board may seek the advice of the commanding officer. If after due consideration the statements are considered to be of a nature warranting disciplinary action, the employee shall be advised that he will be held responsible for such statements. However, he shall be allowed to make a timely retraction of such statements in order to minimize, in so far as possible, the damage caused or to eliminate the need for the additional disciplinary action.

2-5. *VETERANS ENTITLED TO THE BENEFITS OF SECTION 14, VETERANS' PREFERENCE ACT.--Veterans entitled to the benefits of the provisions of Section 14 of the Veterans' Preference Act of 1944 include* persons who are permanent or indefinite preference employees, as listed in NCPI 245.4-1, who have completed a probationary or trial period in a position under the Civil Service Regulations or who have completed one year of current continuous employment in positions excepted from the competitive service of the Federal Government or the Government of the District of Columbia. The following are not included: Employees appointed for a period not to exceed one year, and "peace-time veterans" who have not established the present existence of a service-connected disability or who are not receiving compensation, disability retirement benefits, or pension by reason of Public Laws administered by the Veterans Administration, Department of the Army or the Navy Department.

23 September 1954
C. S. 529

GOVT 'S EXHIBIT NO. 2

[Filed 9/11/61]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SAMUEL BLYTHER	)	
Plaintiff	)	
v.	)	Civil Action No. 2459-56
JAMES T. DYSON and	)	
HENSON C. THOMPSON	)	
Defendants	)	

AFFIDAVIT

COUNTY OF ARLINGTON)	
	) SS.
STATE OF VIRGINIA	)

I Walter A. Leeds, having been duly sworn, on oath depose and say as follows:

1. On June 18 and June 20, 1955, I was Plant Superintendent of the Defense Printing Service and Head of the Reproduction Branch of the Publications Division of the Administrative Office of the Department of the Navy. On said dates Henson C. Thompson was Foreman of the Press Section of my branch and under my supervision. James T. Dyson was Foreman of the Large Press Unit under the supervision of Mr. Thompson. Samuel Blyther was a pressman under the supervision of Mr. Dyson.

2. On Wednesday, June 22, 1955, I received a signed statement from Mr. Thompson which enclosed a signed statement from Mr. Dyson relative to the conduct of Mr. Blyther.

3. It was the duty of Mr. Dyson and Mr. Thompson, as supervisory employees, to furnish management officials through the established chain of command a written statement of the circumstances surrounding any infraction of rules by personnel under their supervision. This procedure required Mr. Dyson to report in writing to Mr. Thompson and required Mr. Thompson to transmit such report to me together with

his statement and any recommendations he might have for the appropriate disposition of the matter.

/s/ Walter A. Leeds
Head, Defense Printing Service
Branch, Publications Division
Administrative Office
Navy Department
Washington 25, D. C.

[Jurat 10th day of Nov., 1959]

[Filed 9/11/61]

GOVT'S EXHIBIT NO. 3

COUNTY OF ARLINGTON)
STATE OF VIRGINIA) SS.

I, Henson C. Thompson, having been duly sworn, on oath depose and say as follows:

1. On June 18 and June 20, 1955, I was Foreman of the Press Section of the Reproduction Branch of the Publications Division of the Administrative Office, Department of the Navy. On said dates James T. Dyson was Foreman of the Large Press Unit of my section and under my supervision. Samuel Blyther was a pressman under the supervision of Mr. Dyson.

2. On Saturday, June 18, 1955, Mr. Dyson reported to me that Mr. Blyther refused to complete a job that Mr. Dyson had assigned him. After discussing the matter with me, Mr. Blyther left the premises of the Defense Printing Service plant.

3. I instructed Mr. Dyson to make a written report of the incident described in paragraph 2. On Monday, June 20, 1955, Mr. Dyson furnished me a written report. On the same day I wrote a report, in the form of a letter to my superior, Mr. W. A. Leeds, Plant Superintendent and Head of the Reproduction Branch, in which I stated the facts as known to me surrounding the incident described in paragraph 2. As an enclosure to my letter I attached Mr. Dyson's statement. A true copy

Govt. Exhibit No. 3 (cont'd)

of my letter is attached hereto as Exhibit A and made a part hereof. I transmitted said letter and enclosure to Mr. Leeds by hand, delivering it either to him or to one of his immediate assistants.

4. It was Mr. Dyson's duty as Foreman of the Large Press Unit to report to me in writing any infractions of rules by personnel under his supervision. Similarly it was my duty as Foreman of the Press Section to report in writing to my superiors any infractions of rules known to me by personnel under my supervision and to forward to my superiors the reports of my subordinates concerning infractions of rules by personnel under my supervision.

5. Exhibit A hereto is the only written statement I made concerning the incident described in paragraph 2. The only use I made of it was that required by my official duties as set forth in the foregoing paragraphs.

/s/ Henson C. Thompson
2041 South Glebe Road
Arlington, Virginia

[Jurat 13th day of Nov., 1959]

20 June 1955

Mr. Walter A. Leeds
Plant Superintendent
Defense Printing Service
Navy Department, BD-831
Pentagon Building

Dear Sir:

As Foreman of the Press Section of the Defense Printing Service, I wish to report an incident that occurred 18 June 1955 in the Press Group (20, Little Chief). The Supervisor of the Group, James Dyson, reported to me about 1405 that he had given a job to Samuel Blyther, and that Blyther had refused to work on the job assigned him, stating that if he could not give him another job, he would clean up his press and go home. I was in the Mimeograph Section at the time checking out some Board work, and immediately went to the Group. Mr. Blyther was

Govt. Exhibit No. 3 (cont'd)

cleaning his press and I advised him that before he left the Section, I wished to talk with him.

Later, he and Mr. Dyson came to the Front Desk, and I asked Samuel Blyther why he had refused to start work on the job assigned him by James Dyson. He answered that his fingers were sore from changing plates the previous day and that he has mashed his finger. However, he had not told his Supervisor this, and when I asked him why he had not told me, he stated that Dyson was acting for me.

I signed him out at 1400 and told him that I would make an official report of the matter on Monday, 20 June 1955.

This employee was not officially excused by me or his immediate supervisor. His tour of duty for the day, 18 June 1955, was from 0730 to 1600. This was an overtime period which the employee stated he would work when asked on 17 June 1955.

/s/ Henson C. Thompson
Foreman, Press Section
Defense Printing Service

Incl. (1)

[Filed 9/11/61]

GOVT'S EXHIBIT NO. 4AFFIDAVIT

COUNTY OF ARLINGTON)
STATE OF VIRGINIA) SS.
)

I, James T. Dyson, having been duly sworn, on oath depose and say as follows:

1. On June 18 and June 20, 1955, I was Foreman of the Large Press Unit of the Press Section of the Reproduction Branch of the Publications Division of the Administrative Office, Department of the Navy. On June 18 and June 20, 1955 Samuel Blyther was a pressman

Govt. Exhibit No. 4 (cont' d)

in my unit and under my supervision. Henson C. Thompson as Foreman of the Press Section was my superior.

2. On Saturday, June 18, 1955, Mr. Blyther refused to complete a job I had given him and left the premises of the Defense Printing Service plant. Mr. Thompson instructed me to make a written report of the incident.

3. On Monday, June 20, 1955, I wrote by hand a report of the incident and gave it to Mr. Thompson. Mr. Thompson gave me a typed copy of my report. I signed the copy and returned it to Mr. Thompson. Mr. Thompson subsequently gave me a photostatic copy of the typed statement. A true copy is annexed hereto as Exhibit A to this affidavit, and made a part hereof.

4. It is my duty as Foreman of the Large Press Unit to report in writing to my superior officers any infractions of rules by personnel under my supervision.

5. Exhibit A hereto is the only written statement I made concerning the incident described in paragraph 2. The only use I made of it was that required by my official duties as set forth in the foregoing paragraphs.

/s/ James T. Dyson
Defense Printing Service Branch
Publications Division
Administrative Office, Navy Department
Washington 25, D. C.

[Jurat 10th day of Nov., 1959]

20 June 1955

TO WHOM IT MAY CONCERN:

On Saturday, 18 June 1955, about 12:30 p.m. I gave Samuel Blyther a job to work on. The job was twenty-eight plates at 850 copies each plus overages. It was not anything hard about the job. The job was regular line work. He ran one plate on the job. I went passed his press and he asked me if I had another job to give him. I asked him

Govt. Exhibit No. 4 (cont' d)

what was wrong with the job he had. He said the plates was hard to get on the press. I tried to explain to him about some of the plates we had been getting lately. I also told him other operators had been complaining about the plates. He told me if he didn't get another job, he was going to clean up and go home. I walked away because I thought he was only joking about cleaning up and going home. He put another plate on his press and ran it. I looked over by his press a little later and he was preparing to clean up. I went over to him and tried to persuade him not to clean up. I told him he was only making it hard for himself. He told me when he says something he means it and continued to clean up. I went up front and reported what had happened to Mr. Henson Thompson.

/s/ James T. Dyson

Incl. (2)

GOVT'S EXHIBIT No. A

[Filed 9/11/61]

UNITED STATES OF AMERICA

Department of the Navy
Washington, D. C., 29 March 1960

I hereby certify that the annexed documents are on file
in the Executive Office of the Secretary, Department of the
Navy.

/s/ R. C. Cronin

Rear Admiral R. E. Cronin, USN
Chief of Industrial Relations

AFFIDAVIT OF THE SECRETARY

I hereby certify that Rear Admiral R. E. Cronin, USN
who signed the foregoing certificate, was at the time of signing
Chief of Industrial Relations
and that full faith and credit should be given his certification as
such.

In testimony whereof, I have hereunto set
my hand and caused the Seal of the Navy Department to
be affixed this fourth day of April, one thousand nine
hundred and sixty.

/s/ Chester Ward

Rear Admiral, USN
Judge Advocate General

For the Secretary of the Navy

1

MR. SPENCE: Under the provisions of the appropriate NCPI, Navy Civilian Personnel Instructions 45.11, Enclosure 1, it is provided that when an employee is charged by his immediate supervisor with any malpractice, so far as his official duties are concerned, he may appeal to his first-line supervisor, which is what you are doing here today, and present his side of the case. He may have a witness, one of the plant employees, if he desires. Apparently, I assume you didn't desire to bring anybody from the plant.

MR. BLYTHER: Well, it was not a desire. I was most unaware that the employees could appear, but I didn't ask anyone to come -- I mean put them in --

MR. SPENCE: (Interposing) I see. So, it is appropriate that we would also have the immediate supervisor up here; and we would have asked Mr. Thompson to appear, but, because of his just having gotten out of the hospital, why, the doctor says he shouldn't come to such a meeting and it wouldn't be particularly in the interests of his health, so, for that reason we just asked you two gentlemen to come, and we will elicit such information as we can see if we can get this settled once and for all; and, if not, you have the right to appeal to the head of the agency, the administrative officer in this case.

2 Would you prefer to tell what happened, to amplify your statement? You have made a statement, Mr. Blyther. That is on July the 9th from your home at 4909 Illinois Avenue. You wrote a letter to Mr. Chancellor in which you explained generally the situation as you saw it; and based on that and on statements taken by the head of the Reproduction Branch, which is, of course, Mr. Leeds, why, a warning letter was issued to tell you that such conduct was, in the estimation of the plant superintendent, cause for a warning notice, and at that time a warning notice was issued. You have asked then that this hearing be granted to, I presume, have the warning notice removed from your personnel jacket?

MR. BLYTHER: Yes, sir.

Govt. Exhibit No. A (cont'd)

MR. SPENCE: So, we will see what information we can get together here today and see if we can settle this thing. Would you like to tell your side of it as it happened in your case?

MR. BLYTHER: Yes, sir.

It was stated that on June 18th -- I suppose it was around 1 o'clock -- my supervisor, Mr. Dyson, assigned a job to me. The job was a job that requires around 1,000 copies run, or over, and the plates were rather difficult plates. At that time we had a group of plates that were difficult to install, and not only difficult to install but they did not fit the press; and on Friday, the day before, I had run those plates all day. I had no tools to use except my fingers, and the machine does require a tool to install those plates, and my fingers --

MR. SPENCE: (Interposing) If I may interrupt, just for my own information, just so I can understand a little better, what kind of plates were they? Were they metal plates?

3 MR. BLYTHER: They were aluminum plates, but they were the heavy plates. Now, I know that most of the time we had been using those plates they had been rather thin and very easy to handle; they were easily broken; but these plates were very difficult to bend around, and some of those were shorter than the simple plates. Some of them we couldn't use at all because they were too short. Some of them were drilled in the wrong place and did not fit the eyes of the press.

MR. SPENCE: Is this the kind that fits on the pin bar?

MR. DYSON: Yes. These have little ends that fit on a pin bar like.

MR. SPENCE: The same way as a paper plate would?

MR. DYSON: Yes.

MR. BLYTHER: That's correct. I had run these plates on Friday all day, and the run was around 60 copies per plate, and usually you do around 50 plates a day on such jobs -- maybe 50 or so, a little more or less. So my fingers -- I had mashed my fingers, not having a wrench. They had just installed new springs on that clamp and it was very stiff

Govt. Exhibit No. A (cont'd)

at that time. I had pretty much tension on it, more than usual, and it had to be that way because the plates would sometimes slip on the press and move out of position as the press would run.

So, having run these plates all day on Friday, my fingers were very soft. They were nervous and very shaken. As I said, I didn't have a tool to install those plates, and a tool is required.

MR. SPENCE: Is that true, Mr. Dyson, as you understand it?

4 MR. DYSON: On the tool required to put the plates on, you need a wrench tool to put a clamp on the side.

MR. BLYTHER: Well, that is a tool.

MR. DYSON: But to put a plate on.

MR. SPENCE: Well, to loosen a clamp, you have a tool normally?

MR. BLYTHER: In a condition where the machine --

MR. POWERS: (Interposing) You were unloosening them with your fingers?

MR. BLYTHER: Yes.

MR. SPENCE: And you feel there should have been a tool to have done that with?

MR. BLYTHER: Well, I didn't have a wrench to fit that press on the side. In fact, I don't see how -- I don't know for sure, but I thought they all had a wrench to fit the press, all operators.

You know, I have only been out there one year now under you, a little over a year; at that time I supervised and classified. At that time I went out there, they didn't issue me tools at all, so I didn't have any.

MR. POWERS: Did you ever ask for tools at all?

MR. BLYTHER: Yes; I have.

MR. SPENCE: Who did you ask? Did you ask Mr. Dyson before this?

5 MR. BLYTHER: Yes; I asked Mr. Dyson -- Mr. Dyson and Mr. Ruddle, I think it is.

Govt. Exhibit No. A (cont'd)

Now, this tool that I am using to install these plates now since this incident -- it's not mine. I only borrowed it. Mr. Dyson borrowed it for me. It belongs to another operator who has no use for it at the present time.

MR. POWERS: Well, the point is that you still do not have any tools issued.

MR. BLYTHER: I have tools, but I do not have this particular tool, and this is the one I use most.

MR. POWERS: You still do not have tools issued you for that press particularly?

MR. BLYTHER: I do have tools, with the exception of this one particular tool.

MR. POWERS: All right. You don't have a complete set of tools issued for this press yet?

MR. BLYTHER: I'm unaware of what we would call a "complete" set, but I do not have this one.

MR. SPENCE: Well, it's apparent that you do not have this one, at any rate.

MR. BLYTHER: So these plates were similar plates to those I had run the day before. So, after running two of the plates, then I asked Mr. Dyson if I could do another job or something, something else, because my fingers were sore and it was dangerous and I had this pain. Also the switch button on the machine -- it was then in bad condition. I don't know what it came from but it has a button on there that's called the inch button, and this button is a button to start it and there is a button to stop it.

MR. SPENCE: What type of press is this, a 14 by 20?

MR. DYSON: A 14 by 20 chief.

MR. BLYTHER: And this starter button on the press did not work properly. Sometimes I would mash it and the press would start; sometimes I would not mash it and the press would not start. Sometimes I'd mash it, and, when you'd mash the button and take your thumb

off of the press, it is supposed to stop if it has the safety guard on the stop button, and that was the condition. It did have the safety button on it, and still does, and it does not stop yet at times.

However, on the day after the interview with Mr. Chancellor, the mechanic and the electrician -- or at least the electrician -- worked on the press, and, as a result, they installed a new switch control button, but the next day they were still -- they reported that the machine was in the same condition even after they had installed a new control button on it. It was still in the same condition. So, I was advised by the mechanic that I should not complain to anyone but him, that he would personally look after the press. So, I told him it was still in the condition, and nothing has been done about it yet.

7 Now, he told me at that time that they discovered oil in the switch -- not the switch buttons but in the switch -- and the next day when the electrician had the switch open, I had an opportunity to observe the oil in the switch. It was not removed. It was just opened up and checked and everything appeared to be in order so they closed it back.

MR. SPENCE: Even though it still had oil in it?

MR. BLYTHER: It still has oil in it.

MR. SPENCE: I don't know if you've seen this statement of the maintenance and electric technicians. Have you seen that yet?

MR. BLYTHER: I have not seen any of the statements or any of the correspondence that you have received down here.

MR. SPENCE: (Reading)

"On July 20, 1955 at 8.30 a.m., Mr. Honey and Mr. Snowden employees of G.S.A. Electric Shop, thoroughly checked Printing Press Serial No. M.P. 353 for electrical shorts, bad contact and etc. Mr. Honey informed me Mr. Cate, assistant Supervisor of Defense Printing Service Maintenance Shop, that he could find nothing wrong with the press electrically that would give any trouble in the operation of it. Mr. Honey has had experience

Govt. Exhibit No. A (cont'd)

with the push button stations sometimes not making proper contact, however, this is not dangerous as long as the machine does not start up by itself as was not stated in this case. Mr. Honey installed a new Push-Button Station in this press to be certain that it would make proper contact should there be a slight unseen default in the old push-button station."

8

Signed by:

"William B. Honey - Electrician CPC-7

"Paul L Snowden - Electrician CPC-6

"Edward W. Cate - Assistant Supervisor
Maintenance Section
WB--19" (Sic)

MR. BLYTHER: That statement report was made on July 20th, is that correct, sir?

MR. SPENCE: Yes.

MR. BLYTHER: According to this copy here.

MR. SPENCE: Well, sometime after July 20th.

MR. BLYTHER: This incident here appeared on June 18th; and even though they have made these statements, if you check the press now you will find the press in the condition as I stated; it's in that condition now.

MR. SPENCE: Even after installing a new pushbutton?

MR. BLYTHER: That's what I said. The electricians were there the very next day as I had made a complaint that the machine was still in the same condition. They returned the next day and opened the switch buttons and this time I was there and I did see the oil in the press but it was not removed and I do know you're not supposed to -- at least, there is no place to put oil in that.

MR. SPENCE: You're not supposed to put oil in there.

MR. POWERS: Mr. Blyther, in getting back a little to the issue, the reason you went home was that you didn't want to run the press; you felt it was dangerous?

9

MR. BLYTHER: Yes. The press was dangerous because my hands were not in a condition to handle those plates and the press at that time.

MR. SPENCE: Well, that's what I was going to ask.

MR. BLYTHER: So, I asked Mr. Dyson if he would assign me something else to do.

MR. SPENCE: Was another press open, Mr. Dyson, or were they all manned Saturday?

MR. DYSON: Well, I think we had another press open, but he didn't complain about the press to me. He complained that the plates were hard to get on the press. At that time we had some plates, but the eye was a little off a bit and some operators had been complaining about the plates. Well, we were going to try to use them up; and Mr. Thompson told me that the first of the month they were going to get a new bunch of plates, and he was the only one that complained about the plates.

MR. BLYTHER: I was not the only one. Other fellows had complained to me. I don't know whether they had complained to you or not, but they seemed to confirm that the plates were not in order.

MR. SPENCE: Well, did you ask to be assigned to another press, or --

MR. BLYTHER: (Interposing) I asked to be assigned some
10 other work, so Mr. Dyson said he did not have anything else for me to do, so I suggested that I clean up and go home and he did not reply. So, a few minutes later, Mr. Thompson came to the press and he asked me why I had to go home, so I complained to him that my hands were hurting and were very nervous and I didn't have anything to install those plates on, so he said, "When you clean up, come to see me," so when I cleaned up, I went to see Mr. Thompson as he asked me to.

So, at that time he asked me about my hands and I told him. He said, "Did you tell Dyson that?" I said, "Yes; I told Mr. Dyson that,"

Govt. Exhibit No. A (cont'd)

so he said, "Well, I know you didn't tell Dyson that," and as he got up to summon Mr. Dyson, Mr. Dyson came up and he asked Mr. Dyson if I told him about my hands, so Mr. Dyson said no. So, Mr. Thompson said, "You go home; I'll sign you out at 2 o'clock," so I said goodbye and I went home. I turned in my production sheet. That was about a quarter to three, so I turned it in and went home.

MR. POWERS: Did you mean to work on some other type of work -- I mean on some other type of press or machine -- or did you mean to get some different plates for the machine you were working on?

MR. BLYTHER: Well, that was up to Mr. Dyson as to what I could do at that time.

MR. POWERS: In other words, had you been given different plates you would have worked on that same press?

11 MR. BLYTHER: There is no way to tell when you get different plates until you get ready to install them, sir.

MR. POWERS: Had Mr. Dyson given you perfect plates, you still would have continued to use this same press?

MR. BLYTHER: I don't know, sir, whether I would have continued to use that same press or not. As I said, I did not think of that at that time and I had been informed that they had no perfect plates, that they had all bad plates, and that they were not going to get any until the first of the month.

MR. POWERS: Well then, what was the purpose behind the assignment? You said you knew they had no different plates and you, therefore, wanted to get on a different type of machine, is that it?

MR. BLYTHER: Yes. I could have gotten another machine, but I did not think of it. I asked for other work.

Now, there are times when a person complains about being unable to do things or having difficulty about doing things, so that they assign other work to him and let him work out the rest of the day, and I thought perhaps that might have been done in this case and it just as easily could have been done.

MR. POWERS: Well, I just wanted to straighten out about this press. The implication was that this was a dangerous plate to use because of a dangerously defective switch. You would have continued to use that press, presuming the plates were all right, is that right?

12 MR. BLYTHER: No, sir. I made a decision that it was dangerous for me to work on the press. Many men have had their hands in the machine and that has been a condition, in work with the press, and so I have to run the press and it's the only thing I have to do, so I had to look out for my hands. Now --

MR. POWERS: (Interposing) Well, what I'm getting at is you're using the press now, are you?

MR. BLYTHER: Yes, sir.

MR. POWERS: And had you been given some good plates, you would have used it then, is that right?

MR. BLYTHER: I don't know, sir. My hands were the ones that were bothering me.

MR. POWERS: It was the hands rather than the press then?

MR. BLYTHER: I think so; that was the condition under which I complained. It was the reason for complaining.

MR. POWERS: No; I'm not questioning that. Believe me, I'm not attempting to question your judgment. I'm just trying to figure out how that question of a possibly defective press got into it because you mentioned the Plates were bad.

MR. BLYTHER: Well, I had taken under consideration the condition of the press. Now, the press had been in that condition before this day. It had been in that condition.

13 MR. SPENCE: Actually the problem was, I mean, you had sore hands?

MR. BLYTHER: That's right.

MR. SPENCE: And this had a tight spring clamp on it. The condition of the inch button wasn't the deciding factor, or else you wouldn't be on the press today?

Govt. Exhibit No. A (cont'd)

MR. BLYTHER: Yes, sir.

MR. SPENCE: The question was your hands.

MR. BLYTHER: And installing those plates. My thumb was too nervous; it could have slipped off.

MR. SPENCE: But if you could have gotten a run of 15,000, for example, so that you could have kept one plate on for the rest of the day, there wouldn't have been any problem as far as you were concerned, is that right?

MR. BLYTHER: That's right; that's what happened. That's probably why the complaint didn't come earlier, because when I began work the job was already set up. All I had to do was get the job running and watch it until the job was finished and then come in --

MR. SPENCE: (Interposing) Did you ask Mr. Dyson if you could go up to the departmental health service to have your --

14 MR. BLYTHER: (Interposing) I was unaware of their being opened on Saturday, but Mr. Dyson and Mr. Thompson told me that they were open. I didn't know that at that time and no one suggested that I go there. Mr. Thompson could have suggested that at the time he interviewed me before I was going home that day before he excused me to go home, that I go up to the medics if he had known it was open; and if he were going to make a complaint, I think he would have. I think it was the only fair thing to do because he knows I was complaining of my hands.

MR. SPENCE: Mr. Dyson, when Mr. Blyther came up to you and asked you for other work, did you have any longer runs that you could have assigned?

MR. DYSON: Well, I had some longer runs but it was later dates; and if he had come to me and told me, in fact, on Friday -- if Mr. Blyther told me that those plates had made his hands sore --

MR. SPENCE: (Interposing) You wouldn't have had him in on Saturday?

MR. DYSON: I mean if it was that sore he wouldn't have come in Saturday.

MR. BLYTHER: That wasn't the question. On Friday we have a classified job that requires a catalog and we usually get that job, and I think when we do get that job all the fellows cooperate and run as many plates as we can so that we can get rid of this job because it's on this, and nobody ever complains of it. That's the reason I didn't complain of it on Friday; and if I suffered Friday through that difficulty and, naturally, not having that same job, I would look forward to having a better day on Saturday.

15 MR. POWERS: Mr. Blyther, before we get off the question of going to see the medics, on July the 9th, 1955 you wrote a letter to Mr. Chancellor, and in the third paragraph you made the statement:

"When I went to see him, he asked me about my hands again and if I had gone upstairs about them".

MR. BLYTHER: Yes, sir.

MR. POWERS: (Continuing)

"I told him, 'No, I did not break the skin, so I did not think it was necessary to see a doctor.'"

MR. BLYTHER: I was referring to Friday when I had mashed my hands.

MR. POWERS: Oh. This was the Friday conversation then, not the Saturday?

MR. BLYTHER: No; this was the conversation on Saturday which I referred to --

MR. POWERS: (Interposing) On Friday?

MR. BLYTHER: On Friday's incidents.

MR. SPENCE: Did you have another press that you could have put him on to run -- I mean with the proper wrench on it so that --

MR. DYSON: (Interposing) Well, to be frank, Mr. Blyther didn't complain to me he didn't have a wrench. I didn't know Blyther to have a wrench for that press. You use a screwdriver or a wrench for the side to put the plate on. He complained to me that the plate was hard

Govt. Exhibit No. A (cont'd)

16 to get on the press. I realized that. I tried to explain to him that other operators were complaining; the first of the month we were getting some new plates in. Now, all the plates weren't like that.

MR. SPENCE: Some of the platemakers take plates out of several different boxes. Some would be good and some would be bad, as a rule.

MR. DYSON: I think it was three plates Saturday morning, three or four plates. Well, those plates -- you say those were all right?

MR. BLYTHER: I didn't say anything about any job being all right. I didn't change any plate until after 1 o'clock in the day. That's when I got this assignment. The run was set up by the night shift and left on the press and I continued it until the job was completed, and I think I have to differ with Mr. Dyson when he said I did not ask him for a wrench. I think I asked him for a wrench several times and he asked Mr. Thompson and they didn't have a wrench for me.

MR. DYSON: But you were operating the press, I mean.

MR. BLYTHER: Certainly I was operating the press at that time. I'd have to wait maybe a year or two before I did get wrenches.

MR. DYSON: On that Saturday, about 12:30, we finished the job I had and I gave him another job. I mean the job consisted of some 20-odd plates. I think it was 950 on the run. He ran one plate and I
17 came past his press and he asked me if I had another job for him and I said, "What's wrong with the job you have?" and he said, "These plates are hard to get on the press." "Well," I said, "all the guys complain some of the plates are hard to get on," so he told me if I didn't get him another job he was going to clean up and go home.

I thought he was joking at the time he said that, so he walked away, ran another plate, and I looked at his press and he was cleaning up, so I went over and asked Blyther, "Are you cleaning up?" and I tried to persuade him not to clean up the press and he did, and he said if he'd say something he'd mean it.

MR. BLYTHER: Did I tell you in that manner, Mr. Dyson?

MR. DYSON: That's the way you told me.

MR. BLYTHER: Did I ask you for another job?

MR. DYSON: Well, you asked me.

MR. BLYTHER: Well, I couldn't ask you and tell you at the same time in the same statement, Mr. Dyson.

MR. DYSON: You asked if it was a 950 copy run.

MR. BLYTHER: Yes. I didn't complain about the run. Did I say anything about the run? Did I say anything about the run, Mr. Dyson?

MR. DYSON: No; you didn't say anything about the run.

18 MR. BLYTHER: I made a statement that the plates were bad. I said that several times here, and I made the statement that I asked you for other work, and I also said that "if you don't have any other work to give me I'll have to clean up and go home" because I couldn't continue under those conditions. I explained to you about my fingers.

MR. DYSON: You did not complain about the press or --

MR. BLYTHER: (Interposing) Well, did you ask Mr. Thompson? You didn't feel that you should give me another job. Did you ask Mr. Thompson whether I should have another job or consideration for my fingers; you didn't do that?

MR. DYSON: No.

MR. BLYTHER: You told him that I was going to go home, did you not?

MR. DYSON: Yes.

MR. BLYTHER: Well, Mr. Thompson came to my press before I cleaned up and asked me to come up and see him, so you must have told him before then.

MR. DYSON: I told you --

MR. BLYTHER: (Interposing) Nevertheless, Mr. Thompson excused me to go home.

MR. DYSON: Why did you find reason to write up a complaint after that?

Govt. Exhibit No. A (cont'd)

MR. BLYTHER: Why did I find reason to write a complaint?

19 MR. SPENCE: If I may interrupt there, here is where we're having a problem. There is apparently a difference of opinion as to whether Mr. Blyther understood that Mr. Thompson said that he excused him to go home and Mr. Thompson's statement which said that he didn't. At that point, as soon as the transcript of this discussion is completed, then I would like to ask Mr. Thompson to take this and let him read it and ask him for a statement which I'll be glad to give you a copy of, too, Mr. Blyther; and we'll see if we can't resolve this misunderstanding or difference of opinion as to whether or not Mr. Thompson said it was all right to go home.

MR. BLYTHER: Well, he distinctly told me to go ahead. He would sign me out at 2 o'clock. Now, if he'd sign me out at 2 o'clock, I would have no way to know whether he signed me out if I walked off the job, so if I walked off the job it was obviously with his permission, whether or not he told me to go home or not.

MR. SPENCE: No; that wouldn't necessarily follow. He could sign you out at 2 o'clock as unexcused. In other words, you get paid on the basis of the number of hours worked.

MR. BLYTHER: That's correct, sir.

MR. SPENCE: And it would be perfectly in order for him to sign out that you had left at 2 o'clock so that the timekeeper could compute actual hours of overtime and then put a notation on the timesheet that the departure at 2 o'clock was unexcused. So, that would be a proper recording of your hours worked for purposes of pay.

20 MR. BLYTHER: Certainly, but there is a question.

MR. SPENCE: At this point I think it would be desirable to get a statement from Mr. Thompson as to whether he was under the impression that you were excused or not excused.

MR. BLYTHER: Well, Mr. Thompson was at work today and he should have been down here today to make those statements.

MR. SPENCE: Well, as I said at the beginning of the hearing, Mr. Thompson's doctor said he should not take part in a hearing, so that's the reason he's not here.

MR. POWERS: Did Mr. Blyther tell you about these fingers being sore and mashed?

MR. DYSON: On Friday he told me.

MR. POWERS: On Friday.

MR. DYSON: But on Saturday he didn't tell me. Your hand gets sore from changing quite a few plates and the next day probably I figured it was all right, but he did not complain to me about his fingers on Saturday.

MR. POWERS: Did you, Mr. Blyther, tell him anything about your fingers on Saturday?

MR. BLYTHER: Yes, I did, in asking him for another job.

MR. POWERS: Did you tell him that your fingers were sore?

MR. BLYTHER: Yes; I did.

MR. POWERS: Now, Mr. Blyther, I want to stick to you on Saturday.
21

MR. BLYTHER: Well, that's what I was coming to because, if I had asked you on Friday and on Saturday I asked and you stated I did not complain about the work, I did not complain about the machine, I certainly complained about something. What was it?

MR. DYSON: About the plates.

MR. BLYTHER: About the fingers and the plates, that's correct.

MR. POWERS: But I do want a statement, Mr. Blyther, that you did not mention anything about your fingers on Saturday.

MR. BLYTHER: I made several statements as such. I did make several statements to Mr. Dyson on Saturday asking for another job or assignment.

MR. POWERS: And you made that statement to him on Saturday?

MR. BLYTHER: I did, sir.

MR. POWERS: There was one other thing about this signing out:

Govt. Exhibit A (cont'd)

Was there any mention that Mr. Thompson would make an official report about this?

MR. BLYTHER: No, sir. The following Saturday Mr. Dyson told me they would refuse to have me work overtime, and they refused to have me work overtime. Since June 18th, I did not work overtime.

MR. POWERS: Did you recall, Mr. Dyson, about Mr. Thompson saying anything about making an official complaint about this?

22 MR. DYSON: No; he did not say anything about making an official complaint.

MR. BLYTHER: Mr. Thompson said, "I'll report that to Mr. Leeds. I'll tell Mr. Thomas and Mr. Leeds that you went home at 2. That was not a complaint or making a complaint. That's what he said, is it not?"

MR. DYSON: He said he'd report it to Mr. Leeds and Mr. Thomas.

MR. POWERS: This is Mr. Thompson talking now, isn't it?

MR. BLYTHER: Mr. Thompson said he would tell Mr. Jack Thomas and Mr. Leeds that I went home at 2 o'clock. He did not say that he was going to make a complaint. As a matter of fact, even though I asked to work overtime on the following Saturday, they refused to let me work overtime, and they still refuse to let me work overtime. Mr. Thompson did not ask me at that time. Mr. Dyson told me to see Mr. Thompson if I could work overtime. He said, "You'll have to wait until this clears up before you work any overtime. Mr. Jack Thomas and Mr. Turner said that you couldn't work overtime until this clears up," so I said, "I thought this was all over. I thought you told me to go home. You didn't tell me you were going to complain about it."

I asked Mr. Jack Thomas, and he asked me to wait until this was all over, and I did not know that they made a complaint to this main Navy until Mr. Chancellor called me on the phone and told me that Mr. Dyson, Mr. Jack Thomas, and Mr. Leeds had written complaints to

Govt. Exhibit No. A (cont'd)

23 this department, this main Navy, concerning my going home on that Saturday, June 18th. It was only then, after he called me on the phone, that I knew that they made these complaints.

MR. SPENCE: Well, at this point there doesn't seem to be much occasion to get a resolution between the employee and his supervisor. I'll have this typed up.

. . . There was a short discussion off the record . . .

. . . The hearing was adjourned at 2:45 p.m. . . .

6 Oct 1959

GOVT. EXHIBIT NO. D

This certifies that I received on 22 June 1955, a signed statement from Mr. Henson C. Thompson which enclosed a signed statement from Mr. James T. Dyson relative to the improper conduct of the subject employee.

It was the duty of the first line supervisor in this as well as any other instance, to furnish to top management officials through an established chain of command a written statement surrounding circumstances where infractions to rules occur among personnel under their supervision. This required procedure was clearly followed in this instance when Mr. Thompson received Mr. Dyson's statement and furnished it to the undersigned together with his statement for forwarding to the proper management official with recommendation for appropriate disposition.

W. A. LEEDS

GOVT'S EXHIBIT NO. E

PD:TFH:mjp
2 Feb 1956

From: Director, Publications Division
To: Mr. Samuel Blyther

Govt. Exhibit No. E (cont'd)

Via: Head, Reproduction Branch (DPS)

Subj: Grievance Appeal; information concerning

Ref: (a) NCPI 80.2-1

1. In accordance with reference (a) a hearing was held on Monday, 14 November 1955 to consider your grievance appeal to have rescinded the letter of warning for failure to accept a work assignment. You were furnished a copy of the transcript of the hearing and offered no corrections.

2. After a complete review of all information presented at the hearing, and of a statement from Mr. Henson Thompson, the following conclusions have been reached:

(a) There is an area of doubt as to whether you and your supervisor had a mutual understanding of your reasons for requesting that you be assigned other duties.

(b) It appears that a misunderstanding existed as to whether you were being excused from work or were leaving without authority.

In view of these facts, it has been decided to withdraw the charges of refusal to accept a work assignment and to remove the warning letter from your personnel record.

However, in the future, if you feel that a safety factor or health condition prevents your accepting and completing an assignment, you will be expected to clearly and fully explain the circumstances to your supervisor. In addition you should be entirely sure that your supervisor has approved a request for leave before you depart from the job.

A. N. SPENCE

Copy to:

Head, Repro Br (DPS)

Head, EXOS Personnel Br

GOVT 'S EXHIBIT NO. L

PD:HZC:bk

27 Jul 1955

From: Director, Publications Division
To: Mr. Samuel Blyther
Via: Head, Reproduction Branch (DPS)
Subj: Warning for failure to accept a work assignment
Ref: (a) NCPI 45.11 Enclosure I
(b) Discussion of 19 July 1955 with Messers. Blyther, Thompson, Dyson and Chancellor

1. In accordance with reference (a), this letter constitutes a warning relative to your conduct during working hours on 18 June 1955.

2. Specifically, your immediate supervisor, Mr. Dyson, and the Foreman, Press Section, Mr. Thompson, formally reported to the Head, Reproduction Branch (DPS), that on 18 June 1955 at approximately 1400 you refused to complete the work assigned by your immediate supervisor. It was reported, discussed, and confirmed during reference (b), that you refused to complete the work assigned to you because you were having difficulty installing plates on your printing press. This difficulty apparently was caused by faulty plates and as a result of having bruised your fingers the day before.

3. You are advised that refusal to perform work as directed by your supervisors cannot be tolerated, and future such instances on your part will reflect unfavorably on your suitability for employment.

4. Further, you are advised that you have the privilege of appealing this warning under established grievance procedures.

A. N. SPENCE

Copy to:
Head, Reproduction Branch (DPS)
Employee Personnel Folder

[Initialed: H. Chancellor
EP Rowe
Potter]

GOVT'S EXHIBIT NO. O

DEPARTMENT OF THE NAVY
Administrative Office
WASHINGTON 25, D. C.

PD:DPS:WAL:cl
22 June 1955

From: Superintendent, Defense Printing Service
To: Director, Publications Division, Administrative Office
Department of the Navy
Subj: Disciplinary Action
Incl: (1) Section Head's Report of Incident
(2) Unit Supervisor's Report of Incident

1. It is requested that necessary action be taken to discipline Mr. Samuel Blyther, who is employed in this Plant as an offset operator, WB-14. It is the opinion of this office that Mr. Blyther's conduct on 18 June 1955 subjects him to the penalties cited for offences 6, 11 and 30 of NCPI 45.11.

2. The inclosures are the statements of his superiors who are responsible for his work. This office supports the position of these employees and requests that prompt action be taken.

/s/ W. A. Leeds

GOVT'S EXHIBIT NO. P

20 June 1955

Mr. Walter A. Leeds
Plant Superintendent
Defense Printing Service
Navy Department, PD-831
Pentagon Building

Dear Sir:

As Foreman of the Press Section of the Defense Printing Service, I wish to report an incident that occurred 18 June 1955 in the Press Group (20, Little Chief). The Supervisor of the Group, James Dyson,

Govt. Exhibit No. P (cont'd)

reported to me about 1405 that he had given a job to Samuel Blyther, and that Blyther had refused to work on the job assigned him, stating that if he could not give him another job, he would clean up his press and go home. I was in the Mimeograph Section at the time checking out some Board work, and immediately went to the Group. Mr. Blyther was cleaning his press and I advised him that before he left the Section, I wished to talk with him.

Later, he and Mr. Dyson came to the Front Desk, and I asked Samuel Blyther why he had refused to start work on the job assigned him by James Dyson. He answered that his fingers were sore from changing plates the previous day and that he has mashed his finger. However, he had not told his Supervisor this, and when I asked him why he had not told me, he stated that Dyson was acting for me.

I signed him out at 1400 and told him that I would make an official report of the matter on Monday, 20 June 1955.

This employee was not officially excused by me or his immediate supervisor. His tour of duty for the day, 18 June 1955, was from 0730 to 1600. This was an overtime period which the employee stated he would work when asked on 17 June 1955.

Incl. (1)

/s/ Henson C. Thompson
Foreman, Press Section
Defense Printing Service

GOVT 'S EXHIBIT NO. Q

20 June 1955

TO WHOM IT MAY CONCERN:

On Saturday, 18 June 1955, about 12:30 p.m. I gave Samuel Blyther a job to work on. The job was twenty-eight plates at 850 copies each plus overages. It was not anything hard about the job. The job was regular line work. He ran one plate on the job. I went passed his press and he asked me if I had another job to give him. I asked him what was wrong

Govt. Exhibit No. Q (cont'd)

with the job he had. He said the plates was hard to get on the press. I tried to explain to him about some of the plates we had been getting lately. I also told him other operators had been complaining about the plates. He told me if he didn't get another job, he was going to clean up and go home. I walked away because I thought he was only joking about cleaning up and going home. He put another plate on his press and ran it. I looked over by his press a little later and he was preparing to clean up. I went over to him and tried to persuade him not to clean up. I told him he was only making it hard for himself. He told me when he says something he means it and continued to clean up. I went up front and reported what had happened to Mr. Henson Thompson.

Inc. (2)

/s/ James T. Dyson

[Filed Oct. 16, 1961]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Samuel Blyther,
Plaintiff

vs.

Civil Action No. 2459-56

James T. Dyson, and
Henson C. Thompson
Defendants

AFFIDAVIT OF PLAINTIFF SHOWING STATEMENT OF MATERIAL
FACTS AS TO WHICH THERE ARE GENUINE ISSUES OF FACTS

District of Columbia, ss:

Plaintiff, Samuel Blyther, being first duly sworn according to law deposes and says as follows:

This is an action, brought by plaintiff for damages against the defendants for their libelous statement written and published of and concerning the plaintiff. That on or about the 18th day of June, 1955, the plaintiff was employed as an offset press operator for the Publications Division, Defense Printing Service, Department of the Navy. That on

the date aforesaid the defendants severally and jointly wrote and published of and concerning the plaintiff the following charges: "That on June 18, 1955 Mr. Blyther refused to complete work assigned by his immediate supervisor. In lieu of performing this work as directed he departed from his duty station without receiving official permission."

Plaintiff further informs the court that the foregoing charges were initiated by the defendants, and were not requested by their immediate supervisors. That the said statement was inspired by the personal motives of the defendants and not in their line of official duty, as appears more fully herein below: The factual background of the case may best be summarized by excerpts from a hearing held in the "Administrative Office, Navy Department, on Monday, November 14, 1955 - 2:00 P.M. - Room 0115 - Main Navy Building." At the time and place aforesaid, the hearing was on the grievance complaint of the plaintiff, conducted before Mr. A. N. Spence, Director, Publications Division, Mr. T. V. Powers, Head, Excs. Personnel Branch, Adm. Office, and Mr. H. E. Chancellor, Adm. Assistant; wherein the plaintiff testified, substantially, that on June 18, 1955, about 1:00 o'clock P.M. his supervisor, Defendant Dyson, assigned a job to him which required around 1,000 copies run, or over, that the plates used for this particular job were difficult, and hard to install, that his fingers were injured on the preceding day from installing difficult plates. That the plates in question were not only difficult to install; but, they did not fit the press. That plaintiff had no tools to work with other than his fingers which were "sore" from injuries sustained the previous day, as aforesaid. That the plates were aluminum and tools were necessary for such installation. Plaintiff further testified at said hearing, in the presence of Defendant Dyson, that he thereupon asked the latter if he could do another job, or something else, because his fingers were "sore," nervous and shaky, that the Defendant Dyson said he did not have anything else for the plaintiff to do, and plaintiff suggested that he close up and go home, to which Defendant Dyson, did not reply. That a few moments later Defendant Thompson, came to the press and he asked your affiant by

affiant had to go home, and affiant told him that his hands were hurting and very nervous. That affiant did not have any tools with which to install the plates in question, that in response to his explanation, the Defendant Thompson told affiant that - when affiant cleaned up - stop by his office. That affiant after he had cleaned up went directly to Defendant Thompson's office, whereupon the latter asked about affiant's hands and was told again that affiant's hands were sore and nervous. Defendant Thompson asked, "Did you tell Dyson that." Affiant said, "Yes, I told Mr. Dyson that." Defendant Thompson said, "Well I know you didn't tell Dyson that," and as he got up Defendant Dyson came up and he asked Defendant Dyson if affiant had told him about his hands and Defendant Dyson said "No." Thereupon Defendant Thompson said "You go on home, I'll sign you out at 2:00 o'clock." So affiant said goodbye and went home.

That at said hearing Defendant Dyson admitted that the press on which affiant was working was without tools and that the plates were defective. When asked at said hearing whether he had another press open that affiant could use, Defendant Dyson said: "Well, I think we had another press open, but he didn't complain about the press to me. He complained about the plates. He complained that the plates were hard to set on the press. At that time we had some plates, but the eye was a little off a bit and some operators were complaining about the plates. Well, we were going to try to use them up, and Mr. Thompson told me that the first of the month they were going to get a new bunch of plates." That the foregoing quote of Defendant Dyson appears on page 9 [p. 35 herein] of the transcript of testimony taken at said hearing. That the Defendant Dyson knew on Friday, June 17, 1955 that affiant had a "mashed hand and sore fingers" for he admitted on page 20 [p. 43 herein] of said transcript of testimony that affiant told him of same "on Friday."

That notwithstanding the foregoing the Defendant Dyson, on June 20, 1955, out of malice, and in order to service his personal motive, and not in the line of duty prepared a false report respecting the incident which he turned over to co-defendant Henson C. Thompson, who was

foreman to both affiant and Defendant Dyson. That on the same day co-defendant Thompson directed a false report to the plant superintendent of the Defense Printing Service respecting the same incident.

That thereafter, and as a result of the false and selfish reports of the Defendants the plant superintendent, Mr. Walter A. Leeds, requested of the Director of the Administrative Office of the Publications Division that the affiant be disciplined for same. That in consequence thereof, by memorandum dated July 27, 1955, affiant received a "warning for failure to accept a work assignment" from A. N. Spence, Director of Publication Division.

That thereafter affiant appealed the "warning action" and on November 14, 1955, the hearing described herein above was held which resulted in the following exoneration of affiant; dated February 2, 1956: "2. After a complete review of all information presented at the hearing and of a statement from Mr. Henson Thompson, the following conclusions have been reached:

"(a) There is an area of doubt as to whether you and your supervisor had a mutual understanding of your reasons for requesting that you be assigned other duties.

"(b) It appears that a misunderstanding existed as to whether you were being excused from work or were leaving without authority.

"In view of these facts, it has been decided to withdraw the charges of refusal to accept a work assignment and to remove the warning letter from your personnel record."

That thereafter the warning letter was removed from affiant's personnel record.

Your affiant states that the said Administrative Office found doubt in the charges leveled against the affiant by the Defendants and struck them from the affiant's personnel record.

Your affiant further states that the Defendants are in fact guilty of using their powers to vent their spleen upon the affiant for personal motives, and to cause the discharge of affiant from government service.

That the said reports of the defendants were aimed at the destruction of affiant and not at the source of the trouble that injured and made affiant's fingers sore and nervous.

Your affiant respectfully submits to the court, that in the light of the testimony adduced at the hearing referred to above, coupled with the conclusions of the Administrative Office, as aforesaid, there are many material and genuine factual issues for jury determination. And that since under the guarantees of the Seventh Amendment to the Federal Constitution, he is entitled to a jury trial to determine such factual issues, he urges the court to declare these factual issues and direct a trial accordingly.

/s/ Samuel Blyther
Plaintiff

[Jurat 16th day of October 1961]

[Filed Nov. 7, 1961]

ORDER

This cause having been heard upon defendants' motion for summary judgment with respect to count one of the complaint and to dismiss count two thereof, and upon consideration of said motion, the memoranda of points and authorities and the affidavits in support thereof and in opposition thereto, and the certified regulations and record of the Department of the Navy, and upon consideration of the oral argument of counsel for the defendants and of Samuel Blyther, pro se, the plaintiff herein, in open court, and it appearing to the Court that there is no genuine issue of material fact with respect to count one and that defendants are entitled to summary judgment as a matter of law with respect thereto, and it further appearing to the Court that, except for the substantive issue relating to libel which has herein been disposed of by granting summary judgment to the defendants on count one of the complaint, that count two fails to state a claim upon which relief may be granted, it is by the Court this 7th day of November, 1961

ORDERED that the motion of the defendants for summary judgment on count one of the complaint be and the same hereby is granted, and it is

FURTHER ORDERED That defendants' motion to dismiss count two of the complaint be and the same hereby is granted.

/s/ Joseph C. McGarraghy
UNITED STATES DISTRICT JUDGE

[Certificate of Service]

[Filed Dec. 4, 1961]

NOTICE OF APPEAL

Notice is hereby given this 4th day of December, 1961, that plaintiff, Samuel Blyther, hereby appeals to the United States Court of Appeals for the District of Columbia from the Judgment of this court entered on the 7th day of November, 1961, in favor of defendants against said plaintiff.

/s/ Samuel Blyther
4909 Illinois Ave., N.W.
Washington, D. C.
Plaintiff

[Certificate of Service]

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BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16817

SAMUEL BLYTHER, APPELLANT

v.

JAMES T. DYSON, ET AL., APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

DAVID C. ACHESON,
United States Attorney,

NATHAN J. PAULSON,
JOSEPH M. HANNON,
BARRY SIDMAN,
Assistant United States Attorneys.

United States Court of Appeals
For the
District of Columbia Circuit
FILED APR 20 1962

Joseph W. Stewart
CLERK

No. 16817

QUESTIONS PRESENTED

In the opinion of appellees, the following questions are presented:

1. Is an absolute privilege applicable to the reports of government employees, which are published solely to their superiors, regarding the performance of duty by a subordinate?
2. Is an absolute privilege defeated by allegations of malice?

(1)

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16817

SAMUEL BLYTHER, APPELLANT

v.

JAMES T. DYSON, ET AL., APPELLEES

*APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA*

BRIEF FOR APPELLEES

COUNTERSTATEMENT OF THE CASE

On June 13, 1956, appellant filed an action in libel and conspiracy against appellees in the District Court. After answer, on September 11, 1961 appellees moved for summary judgment with respect to the charge of libel, and for dismissal with respect to the charge of a conspiracy. The District Court, per Judge McGarraghy, granted appellees' motion on November 7, 1961. (J.A. 54-55) This appeal was noted on December 4, 1961. (J.A. 55)

In this action appellant Samuel Blyther seeks damages for an allegedly libelous statement written and published by appellees James T. Dyson and Henson C. Thompson, jointly and severally, during the course of their employment by the federal government, which statement concerned appellant, an employee subordinate to appellees. Appellant also alleges that appellees conspired to injure him by filing the statement.

Appellant was employed as an offset press operator for the Publications Division, Defense Printing Service, Department of the Navy, on June 18, 1955, the date of the alleged libel. (J.A. 3) Appellees Dyson and Thompson were employed by

the same division of the Department of the Navy on that date, and were appellant's immediate supervisor and foreman, respectively. (J.A. 22, 23) On June 18, 1955 appellee Dyson assigned appellant certain work which he was to complete with his press. (J.A. 26) Appellant began the work, but then asked Dyson for another assignment, stating that the work was difficult to do. (J.A. 27) At approximately 12:30 p.m., appellant said that if he didn't get another job, he would clean up and go home. Thinking appellant was joking, Dyson did not respond, and walked away. (J.A. 27) Somewhat later, Dyson noticed that appellant was preparing to clean up. Dyson attempted to persuade appellant not to clean up, telling him that he was "only making it hard for himself." (J.A. 27) Appellant continued to clean up, and Dyson then reported the incident to appellee Thompson, appellant's foreman. Appellant asserts that he had informed Dyson that his fingers were sore, and that the job he was assigned to do, in view of this, caused him pain. (J.A. 51)

Shortly thereafter, appellee Thompson approached appellant, who was then cleaning up his press. He advised appellant of his wish to speak to him. Subsequently, appellant and Thompson discussed the incident. The former stated that his fingers were sore, that one had been "mashed" and that was why he had refused to do the work assigned him. (J.A. 25) Thompson signed appellant out at 2:00 p.m., advising him that he would make an official report of the matter. (J.A. 25) The work day was to terminate at 4:00 p.m.; neither Dyson nor Thompson officially excused appellant from duty. (J.A. 25)

On June 20, 1955, Dyson prepared a written report of the incident, which he delivered to Thompson, who was his foreman as well as appellant's. (J.A. 26) On the same day Thompson, in his capacity as foreman, directed a written report of the incident, appending Dyson's report, to Walter A. Leeds, Plant Superintendent of the Defense Printing Service.¹

¹ Thompson's report stated in part: " * * * The Supervisor of the Group, James Dyson, reported to me about 1405 that he had given a job to Samuel Blyther and that Blyther had refused to work on the job assigned him, stating that if he could not give him another job, he would clean up his press and go home."

(J.A. 23) Thereafter, by letter dated June 22, 1955, Mr. Walter A. Leeds, the Plant Superintendent, requested the Director of the Administrative Office of the Publications Division to discipline appellant for the June 18 incident. (J.A. 48) By a memorandum-letter dated July 27, 1955 from A. N. Spence, Director of the Publications Division, appellant received a "warning for failure to accept a work assignment." (J.A. 47) He appealed the warning, and a hearing on the matter was held on November 14, 1955. As a result thereof, the charges of refusal to accept a work assignment were withdrawn, and the warning letter was removed from appellant's personnel record.² (J.A. 46)

Thereafter, appellant brought suit, alleging that appellees, jointly and severally, on or about June 18, 1955, published a libelous statement respecting him, to wit:

That on June 18, 1955, Mr. Blyther refused to complete work assigned by his immediate supervisor. In lieu of performing this work as directed, he departed from his duty station without receiving official permission.

Appellant characterizes this statement as having been delivered by appellees to the Head of the Reproduction Branch and to the Director of the Publication Division; the libelous statement would thus appear to consist of Thompson's report with Dyson's report to him appended thereto.

SUMMARY OF ARGUMENT

Appellees' report concerning the misconduct of a subordinate employee, written in the course of their duty as employees of the federal government, and not disseminated to the public, was absolutely privileged. Such privilege is not limited to employees of high rank, or "policy making employees", and is not defeated by allegations of malice.

² Mr. Spence, who conducted the hearing, found that there was an "area of doubt" as to whether appellant and Dyson mutually understood appellant's reasons for requesting other work, and that a "misunderstanding" existed as to whether appellant had been excused from work or was leaving without authority. (J.A. 46)

A civil conspiracy to injure another is not actionable. Rather, the cause of action consists of those acts constituting and in furtherance of the conspiracy. If those acts are not actionable in law, an allegation of conspiracy to commit them similarly is not actionable. Since appellant cannot, as a matter of law, prevail in his charge of libel, his charge of conspiracy fails to state a claim upon which relief can be granted.

ARGUMENT

I. Appellees were absolutely privileged to make the allegedly defamatory statement

A. Allegations of malice do not defeat an absolute privilege

An absolutely privileged communication is one for which, by reason of the occasion on which it is made, no remedy is provided for the damages in a civil action for slander or libel. See *Spalding v. Vilas*, 161 U.S. 483, 498-99 (1896); *Murray v. Brancato*, 290 N.Y. 52, 48 N.E. 2d 257 (1943); 53 C.J.S. 143 (1948). Accordingly, allegations that the communication was made maliciously or with improper motives cannot serve to make actionable an utterance unqualifiedly protected from suit. See *Ashford v. Evening Star Newspaper Co.*, 41 App. D.C. 395, 403 (1914).

Appellant cites *Dickins v. International Brotherhood of Teamsters*, 84 U.S. App. D.C. 51, 171 F. 2d 21 (1948), and *National Disabled Soldiers' League v. Haan*, 55 U.S. App. D.C. 243, 4 F. 2d 436 (1925) in support of his contention that malice destroys an absolute privilege. Appellant ignores the fact that in both cases, defendants were not government employees, and were asserting a qualified, not an absolute, privilege. Where an absolute privilege exists, the motive of the communicant is immaterial. *Laughlin v. Rosenman*, 82 U.S. App. D.C. 164, 163 F. 2d 838 (1947); *Glass v. Ickes*, 73 U.S. App. D.C. 3, 117 F. 2d 273, cert. denied, 311 U.S. 718 (1940); *Cooper v. O'Connor*, 69 U.S. App. D.C. 100, 99 F. 2d 135 (1938); cf. *Taylor v. Glotfelty*, 201 F. 2d 51 (6th Cir. 1952). Admittedly, a conditional, or qualified privilege, is defeated where it is shown that it was made maliciously. But this is the essence of the distinction between absolute and qualified privi-

lege. Appellant's charges of malice are irrelevant, then, if it is determined in the first instance that the allegedly libelous communication of appellees was absolutely privileged.

B. Reports of federal employees to superiors, made in the course of duty, are absolutely privileged

The circumstances surrounding the making of a statement determine whether or not an absolute privilege applies. See, e.g., *Barr v. Matteo*, 360 U.S. 564, 573-77 (1959); *Mellon v. Brewer*, 57 U.S. App. D.C. 126, 18 F. 2d 168 (1927), *cert. denied*, 275 U.S. 530; *Glass v. Ickes*, 73 U.C. App. D.C. 3, 117 F. 2d 273 (1940), *cert. denied*, 311 U.S. 718; *De Arnaud v. Ainsworth*, 24 App. D.C. 167 (1904); *Farr v. Valentine*, 38 App. D.C. 413 (1912); *Poss v. Lieberman*, 187 F. Supp. 841, 845 (E.D.N.Y. 1960), *aff'd.*, — F. 2d — (1962) No. 26692, decided February 13, 1962; *Preble v. Johnson*, 275 F. 2d 275 (10th Cir. 1960); *Miles v. McGrath*, 4 F. Supp. 603 (D. Md. 1933).

The consistent view of the courts has been that, where a federal employee makes a statement in the course of his duties, which statement is published only to his superior, the statement is not actionable. In *De Arnaud v. Ainsworth*, *supra*, the chief of the Record and Pension Office of the War Department was sued for libel for a report he had made to the Secretary of War concerning plaintiff's application for a medal of honor. This Court noted that the report had been made in the course of the defendant's official duty, and that it had been directed to defendant's superior. Accordingly, the report was held absolutely privileged.³ The Court stated the principles underlying the application of the privilege:

Public policy affords absolute protection for what may be said or written by an officer in his official report or communication to a superior, when such report

³Significantly, the Court noted the irrelevancy of the fact that the suit had been brought against the defendant in his private individual character (as in the case at bar) and without reference to his official duties, holding that the posture in which suit was brought did not affect the applicability of the privilege. See also *Laughlin v. Rosenman*, *supra*, at 843; *Cooper v. O'Connor*, *supra*, at 137.

is made in the course and discharge of official duty. Otherwise the perfect freedom which ought to exist in discharge of public duty might be seriously restrained, and often to the detriment of the public service. *Id.* at 178.

In *Farr v. Valentine*, 38 App. D.C. 413 (1912), a former general superintendent of logging in the Indian Service claimed the letter recommendation of the head of the Service to the Secretary of the Interior regarding the superintendent's unfitness for his position was libelous. This Court held that the letter was absolutely privileged, having been written in the course of duty, and directed to defendant's superior. The Court noted the necessity of granting immunity to subordinate federal employees, stating in part:

Everything in this letter is revelant to the point upon which it is centered—the unfitness of the plaintiff for the position occupied by him. Had the Secretary himself written this letter to the plaintiff and spread it upon the files of the Department as a justification for his action in dismissing the plaintiff, clearly personal motives could not have been imputed to such official conduct. And yet there is no more reason for imputing personal motives to the conduct of the head of the bureau, who, in the line of his duty, makes such a recommendation to his superior, the head of the Department, than in imputing such motives to the superior himself. To so hold would, in effect, largely interfere with the proper and effective administration of the business of the Department. Its head can intelligently act only through subordinates. *Id.* at 420.

See also *United States ex rel Parravicino v. Brunswick*, 63 U.S. App. D.C. 63, 69 F. 2d 383 (1934).

The principles stated in *Farr* and *De Arnaud* were affirmed by the Supreme Court in *Barr v. Matteo*, 360 U.S. 564 (1959). In *Barr*, a press release issued by the Acting Director of the Office of Rent Stabilization, in which he announced his intention to suspend the plaintiffs because of specified misconduct, was held to be absolutely privileged. Admittedly, in *Barr* the defendant was the head of an executive department, where-

as in the instant case defendants had authority to perform "less sweeping functions." *Id.* at 573. In *Barr*, however, the Court was concerned with the applicability of an unqualified privilege to publicly disseminated statements; in the instant case, publication was made only to appellees' superior.

Initially, the Court stated the basis for the application of the privilege to the official acts of lesser federal employees:

The privilege is * * * an expression of a policy designed to aid in the effective functioning of government. The complexities and magnitude of governmental activity have become so great that there must of necessity be a delegation and redelegation of authority as to many functions, and we cannot say that these functions become less important simply because they are exercised by officers of lower rank in the executive hierarchy. *Id.* at 572-73.

It was, said the Court, the relationship of the statement of the employee to the matters committed by law to his control or supervision which governed the applicability of the privilege. *Id.* at 573. The Court noted that where an employee was not *required* to speak out, immunity would lie at levels of government "where the concept of duty encompasses the sound exercise of discretionary authority." *Id.* at 575. And it clearly recognized that, as to "acts done in connection with a mandatory duty," absolute privilege applied *regardless* of the rank of the communicant. *Ibid.*

Significantly, Chief Justice Warren, in dissent, also recognized this principle:

It may be assumed, *arguendo*, that a government employee should have absolute immunity when according to his duty he makes internal reports to his superior or to another upon his superior's order. *Cf. Taylor v. Glotfelty*, 201 F. 2d 51; *Farr v. Valentine*, 38 App. D.C. 413; *De Arnaud v. Ainsworth*, 24 App. D.C. 167. This might be a practical necessity of government that would find its justification in the need for a free flow of information within every executive department. It may not be unreasonable to assume that if a maliciously false libel is uttered in an internal report, it will be

recognized as such and discredited without further dissemination. *Id.* at 582.

The dissenting opinions in *Barr v. Matteo* expressed concern over the public dissemination of the alleged defamation. But appellees here did not so disseminate their statement. Thus, the words of the District court in *Poss v. Lieberman*, 187 F. Supp. 841, 843-44 (E.D.N.Y. 1960) *aff'd.*, — F. 2d. — (1962), No. 26692, decided February 13, 1962, are clearly in point:

(I)f *Barr* and *Howard* are wide publication cases, a fortiori there is absolute immunity for official statements made for limited publication.

In *Poss*, plaintiff appeared before defendant, a claims representative of the United States Department of Health, Education and Welfare, at an interview in connection with a claim of plaintiff's wife for social security benefits. In a report made in the case in the agency, defendant stated that plaintiff had told him that he had once been disbarred as a lawyer. When plaintiff later learned of the matter contained in the report, he brought suit for libel. The District Court granted defendant summary judgment. On appeal, the Court of Appeals, after reviewing the recent cases of *Barr v. Matteo*, 360 U.S. 564 (1959), and *Howard v. Lyons*, 360 U.S. 593 (1959), characterized the communication before it as an "internal libel", as distinct from the publicly disseminated statements in *Barr* and *Howard*. It was so characterized because it was a report made, as in the case at bar, solely for internal agency use. The Court stated:

Even if information so transmitted were damaging to plaintiff, it would appear quite unlikely that there would be any dissemination of the information beyond the Agency. There seems little disagreement that in the situation posed in the case presently before us the need for freedom of communication within the agency overbalances the somewhat remote and limited probability of damage to the person libeled; and that here the defendant should be cloaked with the immunity of absolute privilege. *Id.* at p. 7 of slip opinion.

See also *De Busk v. Harvin*, 212 F. 2d 143 (5th Cir. 1954); *United States ex rel. Parravicino v. Brunswick*, 63 U.S. App. D.C. 63, 69 F. 2d 383 (1934).

In sum, the established criteria for immunity in the instant case are: (1) whether the alleged libel was published in the course of the duty of appellees; and (2) whether it was published to appellees' superior and given no public dissemination. Since these are the facts of record, the statement of appellees is not actionable.

C. Appellees' report to their superior was made in the course of duty

The record clearly discloses that appellees had both the authority and the duty to report as they did on the conduct of appellant. Appellee Dyson was appellant's first line supervisor. Appellee Thompson was appellant's foreman. As such, it was their responsibility to furnish the management officials of the Publication Division, Department of the Navy, a written report bearing upon the circumstances of appellant's alleged infraction of work rules. See paragraph 2-3 of section 2, Navy Civilian Personnel Instructions (J.A. 18); Affidavit of Walter A. Leeds (J.A. 22). In Mr. Leed's words:

It was the duty of Mr. Dyson and Mr. Thompson, as supervisory employees, to furnish management officials through the established chain of command a written statement of the circumstances surrounding an infraction of rules by personnel under their supervision. This procedure required Mr. Dyson to report in writing to Mr. Thompson and required Mr. Thompson to transmit such report to me together with his statement and any recommendations he might have for the appropriate disposition of the matter.

In any event, even if appellees had not been *expressly* required by regulation and by the direction of their superiors to report on the conduct of a subordinate, their statement would be absolutely privileged. For as this Court said in *Cooper v. O'Connor*, 69 U.S. App. D.C. 100, 104, 99 F. 2d 135, 139 (1938), *cert. denied*, 305 U.S. 643:

It is not necessary—in order that acts may be done within the scope of official authority—that they should be prescribed by statute [citation omitted]; or even that they should be specifically directed or requested by a superior officer [citation omitted]. It is sufficient if they are done by an officer “*in relation to matters committed by law to his control or supervision*” [citation omitted]; or that they have “*more or less connection with the general matters committed by law to his control or supervision*” [italics supplied] [citation omitted]; or that they are governed by a lawful requirement of the department under whose authority the officer is acting.

See also *Glass v. Ickes*, 73 U.S. App. D.C. 3, 117 F. 2d 273 (1940), *cert. denied*, 311 U.S. 718. Again, in *Preble v. Johnson*, 275 F. 2d 275, (10th Cir. 1960), after noting that in *Barr v. Matteo* “the Supreme Court expressly rejected a rigid scope of duty, as literally prescribed by rule or regulation, in favor of a more generalized concept of duty,” the court said that “statements which are neither strictly authorized by, nor in furtherance of, some rule or regulation may nevertheless be in line of official duty, hence privileged, if they are deemed appropriate to the exercise of the utterer’s office or station.” *Id.* at 278. See also *Gaines v. Wren*, 185 F. Supp. 774 (N.D. Ga. 1960).

As concerns the dissemination of appellees’ report, it is a matter of record that appellee Dyson made only one statement concerning appellant’s conduct, and that the only use he made of that statement was to communicate it, orally and then in writing, to appellee Thompson. (J.A. 26) It is a matter of record that appellee Thompson made only one statement concerning appellant’s conduct, and that the only use he made of that statement was to communicate it, in writing, to his superior, Mr. Walter A. Leeds, Plant Superintendent of the Defense Printing Service. (J.A. 24) Accordingly, the cri-

teria for immunity having been met, the statements of appellees are not actionable.⁴

II. Appellant's allegation of a conspiracy and resulting damages fails to state a claim upon which relief may be granted

In count 2 of his complaint appellant charged appellees with a conspiracy to injure, retard, confuse and separate appellant from his employment and to cause unrest and disorganization in his work by the filing of false charges against him to the effect that he had refused to perform a certain work assignment. In brief, the alleged conspiracy was to publish the June 20, 1955 report. The District Court dismissed this count, holding that it failed to state a claim upon which relief could be granted.

Appellant does not appear to contest this dismissal in his brief, but rather, claims solely that malice destroys an absolute privilege and that appellees' statements were not within the scope of their duties.

Whether or not appellant has in fact abandoned his second count, the ruling of the District Court was clearly correct. It is well settled that, where a civil conspiracy to injure is asserted, the elements or acts which cause the injury and which are in furtherance of the conspiracy are actionable, and not the conspiracy itself. *United States v. Pan American Petroleum Co.*, 55 F. 2d 753, 778 (9th Cir. 1932), *cert. denied*, 287 U.S. 612; *Ewald v. Lane*, 70 U.S. App. D.C. 89, 104 F. 2d 222 (1939); *De Bobula v. Goss*, 90 U.S. App. D.C. 28, 193 F. 2d 35 (1951). Moreover, it is equally clear that an alleged conspiracy among government employees relating to actions taken by them within the scope of their official duties is not actionable where

⁴Nowhere does plaintiff's complaint allege that appellees acted beyond the scope of their duty. In any event, even conclusory averments to that effect, such as those made in appellant's brief, do not create an issue precluding summary judgment where the basis of the privilege plainly appears, as in the instant case, from the underlying facts. *Cochran v. Couzens*, 59 U.S. App. D.C. 374, 42 F. 2d 783 (1930), *cert. denied*, 282 U.S. 874.

those actions were lawful and privileged on the part of each employee. *Cooper v. O'Connor, supra*. Thus, since a conspiracy is alleged by appellant where the act in furtherance of the conspiracy is a libel, and the libel is not actionable, his charge of conspiracy fails to state a claim upon which relief can be granted.

CONCLUSION

Wherefore, it is respectfully submitted the judgment of the District Court be affirmed.

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